No. 20134

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, **PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC.**, a corporation, **TOWER LANES, INC.**, a corporation, **BOWLERO, INC.**, a corporation, **DAFFODIL BOWL, INC.**, a corporation, **PARADISE BOWL, INC.**, a corporation, **C. A. LOYD** and **JANE DOE LOYD**, his wife, d/b/a **SIXTH AVENUE LANES**, **THEODORE TADICH** and **JANE DOE TADICH**, his wife, **DEZ ISAACSON** and **JANE DOE ISAACSON**, his wife, **KENNETH KULM** and **JANE DOE KULM**, his wife, **PHILLIP CUNNINGHAM** and **JANE DOE CUNNINGHAM**, his wife, **CLEVE REDIG** and **JANE DOE REDIG**, his wife, and **ART UNKRUR** and **JANE DOE UNKRUR**, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.
Honorable **William J. Lindberg**, District Judge.

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT.

This is an action under the Federal antitrust laws for treble damages, brought by the proprietor of a bowling establishment in Tacoma, Washington against a group of proprietors of other bowling establishments in Tacoma

and the state and local trade associations of bowling proprietors in which the defendant proprietors are members and in which the plaintiff was at one time a member. The defendants appeal from the judgment of the District Court, entered upon the jury's verdict in favor of the plaintiff in the amount of $35,000 (Tr. 2813-7), which was trebled to $105,000, together with an allowance of $22,500 for plaintiff's attorneys' fees. (R. 249.)

The plaintiff, Pacific Lanes, Inc., filed its complaint in the District Court on December 7, 1961. (R. 1.) Plaintiff alleged that beginning sometime prior to the time it opened for business on October 9, 1959, the defendants engaged in a conspiracy and combination extending throughout the United States, including western Washington, and consisting of a continuing agreement and concert of action by the defendants and other co-conspirators:

1. To conduct bowling tournaments open only to those who restrict or agree to restrict their league and tournament bowling entirely to member establishments, thereby declaring ineligible any bowler who does or has done any such bowling in a non-member establishment.

2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments and by soliciting suppliers of bowling equipment and other persons not to deal with such persons.

3. To fix and stabilize prices charged for bowling and to refrain from competing for patronage except as against non-member establishments.

4. To regulate and control the size of bowling establishments and the conditions under which bowling may be carried on. (R. 5-6, 170-172.)

Plaintiff claims that the conspiracy caused injury to its business and constituted an unlawful combination in restraint of, and an unlawful attempt to monopolize, interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 USCA §§1, 2)[1] and Sections 3 and 7 of the Clayton Act (15 USCA §§ 14, 18). (R. 7.) The alleged Clayton Act violations were withdrawn prior to submission of the case to the jury.

Plaintiff alleged it had sustained $40,000 actual damages, and it prayed for recovery thereof trebled, together with a preliminary injunction to restrain the enforcement of the above tournament eligibility rule against it. (R. 8.) The injunctive relief sought has been abandoned.

The District Court found in its pretrial order that it had jurisdiction of the action under Sections 4 and 16 of the Clayton Act (15 USCA § 15 [suits by persons injured] and § 26 [injunctive relief for private parties]). (R. 160.)

The defendants are the following[2]:

(a) The Washington State Bowling Proprietors Association, Inc. (WSBPA) is a non-stock, non-profit Washington corporation having its principal place of business in Seattle. The members of the WSBPA are individual

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[1] Sections 1 and 2 of the Sherman Act are set out in Appendix A below.

[2] The Bowling Proprietors Association of America, Inc., is an Illinois corporation having its principal office in Park Ridge, Illinois. The members of the BPAA are individual and corporate proprietors of bowling establishments throughout the United States. (R. 161.) The BPAA was named as another defendant in this action. However, service as to it was quashed and it was not a party below and is not a party in this appeal. (R. 20.)

and corporate owners and operators of bowling establishments throughout the State. (R. 161.)

(b) The Pierce-Olympic Bowling Proprietors Association, Inc., (POBPA) is a non-stock, non-profit Washington corporation having its principal offices at Tacoma. Its members are individual and corporate proprietors of bowling establishments in Pierce County, Washington. (R. 161.)

(c) Tower Lanes, Inc., Bowlero, Inc., Daffodil Bowl, Inc., and Paradise Bowl, Inc., are each a Washington corporation having its office in Pierce County and engaged in the bowling business in that County. Each is and has at all relevant times been a member of the WSBPA and the POBPA. (R. 161-2.)

(d) There are 14 individual defendants, comprised of seven sets of husbands and wives, each being a marital community under the laws of Washington. Each of the defendant husbands at various times pertinent to the action was and is an operator or officer of an operator of a bowling establishment in Pierce County and a member or officer of a member of the two trade associations. (R. 162.)

The case was tried before a jury commencing December 4, 1964 and concluding with the verdict announced on December 31, 1964. (Tr. 1, 2820.)

At the close of plaintiff's case, defendants moved orally for a directed verdict on the grounds that the plaintiff's evidence did not substantiate that there was a restraint on interstate commerce. (Tr. 1226, 1228-36.) The Court denied the motion with respect to the alleged violations of the antitrust laws by virtue of the eligibility rule and reserved ruling with respect to the "overbuilding" element of the case. (Tr. 1236-8.) The motion was renewed at the close of all the evidence and denied. (Tr. 2540.)

After verdict, defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The gist of the grounds alleged in support of the motion were: The evidence was insufficient to show that any alleged restraint had any effect upon interstate commerce; the Court erroneously instructed the jury that the tournament eligibility rule was a group boycott illegal per se and, in effect, that the defendants could not lawfully have any eligibility rule; that the instruction that price fixing was a per se violation was erroneous because under the evidence it was not applicable; the Court erred in failing to direct the verdict for defendants, in failing to give instructions offered by the defendants, and in failing to allow certain of defendants' exhibits to go to the jury during its deliberations; and the verdict was grossly excessive and not supported by the evidence. (R. 227.)

The motion was denied by the Court in a memorandum decision filed March 9, 1965. (R. 232.) Judgment was entered on the verdict on March 9, 1965. (R. 249.)

The District Court had jurisdiction in this case under the above sections of the Clayton Act and 28 USCA § 1337. This appeal is authorized by 28 USCA § 1291, which vests this Court with jurisdiction to hear appeals from final decisions of the District Court. Defendant's notice of appeal was timely filed on March 31, 1965, within 30 days after the District Court entered its final judgment. (R. 252.)

STATEMENT OF THE FACTS.

The background in which the action arises is the sport or recreation of bowling. Bowling has become one of the most popular sports in the United States. Approximately 36 million Americans bowl each year and they are served by approximately 9,500 commercial bowling establishments. (R. 95.)

Bowling involves three distinct components: First, the bowling proprietors who own and operate the establishments in which the sport is conducted. Second, the bowling manufacturers who provide to the proprietors the lanes, equipment and supplies necessary to equip and operate bowling establishments. Third, the bowler who actually participates in the sport at a bowling establishment.

Proprietors: The parties in this case are a part of the first component. The individual parties, including corporations, are proprietors of bowling establishments in Tacoma, Washington. The WSBPA is the trade association of bowling proprietors in Washington and the POBPA is the trade association of bowling proprietors in Tacoma.

The majority, or about 6500, of the commercial bowling establishments in the United States are owned by members of the Bowling Proprietors Association of America, Inc., which is the national trade association of proprietors. (R. 95; Tr. 122, 126.) The BPAA is an Illinois not-for-profit corporation with its home office in Park Ridge, Illinois. (Tr. 123, 125-6.) It renders a variety of services for its member proprietors, such as education and information through management bulletins and kits of materials for new members, and kits on how to organize leagues. (Tr. 1612-3.)

There are 50 state trade associations of bowling proprietors which are affiliated with the BPAA. (Tr. 130-1.) Defendant WSBPA is one such affiliate. (Tr. 149.) There are approximately 175 bowling establishments in the WSBPA. These establishments have about 3,000 bowling lanes and constitute about 90% of the commercial bowling establishments in Washington. (Tr. 369-72, 702.) One thing done by the WSBPA has been a forum each year for bowling instructors, and it renders other services for its members, including an insurance trust fund for members and their employees. (Tr. 1613, 2326, 2340, 2406-7.)

There are in addition local trade associations of bowling proprietors which are affiliated with the BPAA through their respective state associations. (Tr. 131.) Defendant POBPA is one such local affiliate. (Tr. 149.) Individual bowling proprietors who are members of their respective local and state affiliated proprietor associations automatically become members of the BPAA. (Tr. 131.)

The POBPA was organized about mid-1959. (Tr. 1692, 2120.) The area which it serves in Washington is Pierce County in which Tacoma is located. One of its services to its members is a cooperative advertising program. (Tr. 2182.) The dues paid by a POBPA member are $17.50 per lane per year, and this covers the dues for the WSBPA and BPAA as well. (Tr. 355.)

There are 20 establishments in the Greater Tacoma area. (DX A-8.) Seven of these, having 58 lanes total, started in or before 1951. By 1958, seven houses had been added, totaling 132 lanes. In 1959, two new 24-lane houses were installed, one being Pacific Lanes, and one of the older houses added four lanes, a total of 52 additional lanes. In 1960, Bowlero Lanes with 32 lanes opened May 6, and

Pacific Lanes added 12 lanes in September. In 1961, two new houses were opened, totaling 48 lanes, including New Frontier Lanes on September 22, with 32 lanes. Midway Bowl with 12 lanes closed in the fall and moved to New Frontier. No new house has been installed or lanes added to an existing house since 1961. In 1962, six lanes were removed from an older house. In January 1964, Lakewood Lanes with 24 lanes burned down. (DX A-8.)

Of these 20 houses, two of them are in King County and are not in the POBPA's area and two of them no longer are in business. Of the 16 houses remaining, five houses having 80 lanes are not POBPA members, including Pacific Lanes which resigned in October 1960, and 11 houses having 278 lanes are members. Thus, about 23% of the lanes are not in membership. (DX A-8.)

Membership in the WSBPA has been open to any proprietor who applied (Tr. 409, 2410), and individual proprietors so testified as to their individual cases. (Tr. 2339, 2365-6.) Membership in POBPA has also been open to any proprietor in Pierce County wanting to join and able to pay the initiation fee of $100 per lane. (Tr. 355, 1835-7.) Those who applied were promptly admitted. (Tr. 1058, 1746, 1835, 2430.) The same open membership policy has applied in other local BPA's in Washington. (Tr. 2366, 2430.)

There was evidence regarding the application of Secoma Lanes in Federal Way, Washington, for membership in POBPA, some to the effect that its membership was delayed because there had been objection by some proprietors that the building of Secoma caused an "overbuilding" or oversupply of lanes in its area. (Tr. 242, 732-4, 756, 1610-2, 1629, 1631-3, 1678, 1685-6; PX 29, 30, 34 and 63.)

There was also evidence that Secoma was not located in the POBPA territory but was in King County, that its application to join POBPA was referred to the King County BPA because of American Bowling Congress matters, that membership in the King County BPA was promptly granted, and in effect that there was no particular delay from the time Secoma applied until it received membership. (Tr. 242, 260, 747, 1637, 1826-30, 2412.) One of plaintiff's witnesses, Mrs. Coles, secretary of the state women's bowling association, testified the Secoma application had originally been referred to the POBPA and then was referred back to Seattle because of the manner in which the men bowlers were assigned to a city association. The proprietors had nothing to do with it. The ABC controls it. (Tr. 260.)

Manufacturers: The two major bowling manufacturers or suppliers in the United States are the Brunswick Corporation and American Machine and Foundry (AMF). (Tr. 150.) Brunswick is located in Chicago, Illinois, and has a factory in Muskegon, Michigan. AMF is located in the New York City area and has a Chicago sales office. (Tr. 140-1.) Both companies maintain branch managers in the State of Washington, whose territories include the adjacent states. (Tr. 266, 1675.) The two manufacturers have done most of the bowling supply business in Washington and have been approximately equal in sales. (Tr. 273, 1676.) Bowling proprietors are the customers of each. (Tr. 267.)

Substantially all of the pin-setting equipment and furniture used in bowling establishments, as well as some of the bowling supplies, such as balls, bags, and shoes, stocked and resold by proprietors, is manufactured and produced in states other than Washington and shipped into Washington by the manufacturers. (R. 162; Tr. 267-8, 271.) In

1962 AMF sold $429,000 of bowling supplies in Washington and in 1963, $493,000. (Tr. 267.) In the years 1959 through September, 1964, about $1,830,000 has been paid to AMF by proprietors in Washington to put in lanes. (Tr. 270.) AMF both sells and leases pin-setters. If leased, the proprietor pays ten cents per unit of 11 frames, or line, as rent on the first 10,000 lines bowled per lane and a decreasing rental figure as the amount of lines bowled increases per lane, with a minimum rental of $800 a year. (Tr. 271-2.) AMF has a total of 1,764 pin-setting machines in Washington, of which 1,430 are leased. The total minimum rental received by AFM per year from pin-setting machines in Washington in 1964 was about $1,144,000. (Tr. 272-3.) These payments are sent by the proprietors to AMF's office located on Long Island, New York. (Tr. 273.)

Bowlers: Bowlers primarily engage in, and bowling proprietors derive their income primarily from, open play and league bowling. "Open play" refers to the patronage of individual bowlers competing among themselves. "League play" refers to organized leagues of bowlers consisting of competing teams of up to five members per team and up to five to eight teams per league. Leagues ordinarily bowl one night per week at a scheduled time during a season of from 32 to 36 weeks per year. (R. 163.) League bowling accounts for about half of the total revenue of commercial bowling establishments. Each year, approximately 7,000,000 men and women engage in league bowling in the United States. (R. 95.)

Plaintiff called a number of individual bowlers as witnesses. As they indicated, their bowling is not their occupation or business. Their occupations included all kinds of work, such as housewives, pressmen, garage owners, a longshoreman, salesmen, civil service employees, a

fireman, a glazier, a railroad brakeman, a truck driver, and a plywood worker, as well as retired persons. (Tr. 441, 459, 472, 479, 487, 497, 507, 517, 530, 538, 626, 635, 646, 657, 663, 671, 678, 684, 688, 703, 712, 722, 766, 771, 776, 816.)

Of the approximately 36 million Americans who bowl each year, about 5 million to 7 million male bowlers are members of the American Bowling Congress (ABC). (Tr. 142.) About 3 million women bowlers are members of the Women's International Bowling Congress (WIBC), the counterpart to the ABC. (Tr. 227-8.) The ABC prescribes the standards for lanes, equipment and scorekeeping, as well as the rules for playing the game and for tournaments. (Tr. 2394-5.) To become an ABC member, the male bowler has to be a member of an ABC sanctioned league bowling in an ABC certified bowling establishment. (Tr. 79-82, 92, 106.) In order to be sanctioned by the ABC, a league must abide by ABC rules having to do with the regulation of league bowling. (PX 239.) Non-ABC members are not permitted to bowl in ABC tournaments or sanctioned leagues. (Tr. 105-7, 2385-6; PX 239.) Members who bowl in non-sanctioned leagues or tournaments are subject to suspension for at least six months, are disqualified from bowling or holding office in a sanctioned league, and forfeit their winnings. (PX 239.) It is up to the member to ascertain whether the league is sanctioned. (PX 239.) The ABC suspends members who violate its rules. (Tr. 1532; PX 239; DX A-68.)

There are associations or chapters of ABC and WIBC members in Washington. The Washington State Bowling Association has approximately 100,000 members (Tr. 76) and the Washington State Women's Bowling Association has about 74,000 members. (Tr. 228.) The Greater Tacoma Bowling Association (GTBA) is one of 2,500 city associ-

ations of ABC members. (Tr. 75.) It has about 10,000 members. (Tr. 76.) There is also a WIBC chapter in Tacoma. (Tr. 91.)

Economic Conditions.

The period 1955-59 witnessed the greatest growth in bowling. (Tr. 1595-6, 1923-4.) Both the demand for bowling and the supply of bowling establishments grew. (Tr. 1923-4.) Both league and open bowling were very good. (Tr. 1598.) Bowling was "booming" in 1958. (Tr. 415.)

In the period 1959-62, conditions changed. Nationally, the industry is now in a depressed condition. (Tr. 1595-6.) The supply of establishments continued to grow but the demand leveled off with the result that in the 1960's, the industry as a whole has been in dire straits. (Tr. 1924.) There has been a vast drop in open bowling and no corresponding increase in league play. (Tr. 1595-8.) About half of the establishments have been non-profitable, the other half enjoying only a low rate of profit. (Tr. 1925-6.) The bowling manufacturers have suffered a sharp drop in the value of their stock on the stock exchange. (Tr. 1595-7.) The industry is a striking example of what happens to an industry which becomes popular and builds a large number of establishments to answer demand and then becomes overbuilt and the profit rate falls dramatically. (Tr. 1927.)

These conditions are as true in the State of Washington as they are nationally. (Tr. 1925-6.) AMF's sales of pinsetters and lanes in Washington dropped sharply. (Tr. 268-9, 271, 299.)

These depressed conditions are reflected also in Tacoma and are probably aggravated a little more there (Tr. 1595-6.) The expansion of bowling establishments has

almost trebled. For every lane in Tacoma in 1954, there were 3,172 people in Pierce County and 1,547 in Tacoma, whereas in 1964, for every lane there were 1,206 and 526 people respectively. (Tr. 1437-9.) The supply of bowling establishments exceeded the demand to the extent that individual establishments have suffered. (Tr. 1595-7.) The proprietors' peak business was in the 1961-62 season. Up to that time, their business had increased year by year. Since then, bowling has been on a decline. (Tr. 1440-1, 1924-8.) This has been true at Pacific Lanes as well as other establishments. (Tr. 1941.) There has been a lessening of interest in bowling, including league bowling. (Tr. 1748.) New establishments have gained business at the expense of the older ones. (Tr. 1317-8, 2511-2.) One Tacoma proprietor, now out of business, testified that his business went down as new establishments came in and that the competition was between new and old houses and not between members and non-members of the POBPA. The older houses did not have the automatic pinsetters and could not keep up. (Tr. 439-40.) One establishment dropped its POBPA membership because it could no longer afford to belong. (Tr. 409.)

Pacific Lanes.

Plaintiff's bowling establishment was opened for business in October 1959. (Tr. 336.) It is owned by Charles Hoffman, his wife, and their attorney. (Tr. 336.) James Stevenson was one of the original partners but his interest was purchased by Mr. Hoffman in April 1962. (Tr. 336, 945.)

When opened, the house had 24 lanes. Twelve lanes were added in its first season. (Tr. 338, 1123.) As such, it is the largest establishment in Tacoma. The next two in number of lanes are 32-lane establishments, Bowlero Lanes and New Frontier Lanes.

Shortly after it opened, in December 1959, Pacific Lane applied for membership in POBPA and was admitted a the Association's next meeting about a week or two later (Tr. 581, 1692, 1835.) Hoffman testified they joined be cause they were new in the business, it seemed like all th other houses belonged, and it appeared to be the prope thing to do. (Tr. 1193.) Both Hoffman and Stevenso attended almost every meeting of the POBPA (Tr. 43 958, 1116), and participated in its business until Pacif Lanes resigned in October 1960. Hoffman was at ever meeting. (Tr. 1116.)

Pacific Lanes has been and is successful. (Tr. 138, 2389-91.) It has a good location and is equal to any hous in town. (Tr. 105, 320.) One witness said it was bett than the other establishments. (Tr. 1451.) It has been "top customer" of AMF ever since it opened. No on does more business. (Tr. 295, 471.)

Ninety-nine point nine percent of Pacific Lanes' bus ness comes from Pierce County. (Tr. 1182-3.) No bowle from out of state bowl in its leagues. (Tr. 1182.) M. Hoffman testified Pacific Lanes does not compete wi other houses in Tacoma except those located near it. (T. 1182.)

Pacific Lanes withdrew from POBPA membership n October 1960. (Tr. 370, 581.) It was notified in ear June 1960 that one POBPA member, Villa Lanes, hd complained that Pacific Lanes had accepted a league fr the 1960-61 season which had bowled at Villa the previ s season, without notifying Villa that the league intend to move to Pacific Lanes. At a meeting on October 1, 1960, Messrs. Hoffman and Stevenson were asked abt this and admitted they had not notified Villa. At that meeting, they did not relate what they rela d

at the trial in the instant case (over four years later), *i.e.*, that the league secretary told them he had notified Villa and that they thought this was all the notification to Villa which was necessary. After the meeting, Hoffman and Stevenson were notified Pacific Lanes had been suspended for two years with the alternative of paying a $1,000 fine in lieu of the suspension. They were advised there was an appeals procedure available, but decided not to appeal or to pay the fine and, instead, to withdraw or resign from POBPA, which they did later in October 1960. (Tr. 370, 581-3, 966-72, 1003-4, 1126, 1704, 1719, 1933-4, 2114-5, 2170, 2210-8.) At the same meeting, a similar complaint was heard against Bowlero Lanes. (Tr. 1169.) Hoffman testified that at the meeting he and Stevenson did not object to lack of notice of the meeting or to the manner of conducting the meeting (Tr. 1168), although he did voice these objections at the trial.

Pacific Lanes publicized the fact it had resigned and indicated it was proud that it was no longer a member. (Tr. 1745, 2179.) It then sponsored a bowling team called "The Outlaws" which got a lot of publicity. (Tr. 2115.)

Shortly afterwards, Pacific Lanes was asked to rejoin the association but did not do so, and has never rejoined. (Tr. 1004-5, 1618-20.) There was evidence that Hoffman stated as the reason for not rejoining that "we are doing so well out of it we can't afford to." (Tr. 1620.) Hoffman testified that he did not recall making that statement (Tr. 1194) but that he has said Pacific Lanes was doing well. (Tr. 2451.) Other witnesses testified to statements by Mr. Stevenson after Pacific Lanes dropped its membership that Pacific Lanes was doing better than before and that it did not need the association. (Tr. 2158, 2349-51.) Stevenson testified he did not believe he said Pacific Lanes

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was making more money while out of the Association, but it is possible he said they could not afford to go back into the Association. (Tr. 1005-6.) Stevenson always felt his business was good in comparison with other houses in his locality. He quoted lineage figures showing they had very good business. (Tr. 2387-91.)

Bowling Tournaments.

The ABC and its affiliated state and local associations, the BPAA and its state and local affiliated associations, as well as individual proprietors, independent tournament promoters, bowling equipment manufacturers, and numerous industrial or commercial enterprises, conduct bowling tournaments. (R. 163; Tr. 145, 2206-7.) Tournament bowling is that type of bowling done by individuals or teams, or combinations of both, in a prearranged contest in which participants generally compete to determine the highest score for prizes in cash or cash and trophies. Tournament entry fees are ordinarily paid by the individual bowlers and teams, and fees for use of the bowling lanes may be paid. (R. 163.)

The GTBA conducts three tournaments a year in Tacoma. (Tr. 91.) The Women's Bowling Association in Tacoma also has an annual tournament. (Tr. 91.) These tournaments are open to all members of the respective bowling associations. (Tr. 79-82, 91.) A bowler has to be a member, however, in order to be eligible for such tournaments. (PX 239, 240.) According to the GTBA Secretary, the reason for this is that non-members should not be entitled to the same benefits as members, and one benefit of ABC membership is its tournaments and other prizes. (Tr. 106-107.)

Both the ABC and the WIBC attempt to keep track of their respective members' scores and standings in order to maintain handicaps for bowling tournaments. (Tr. 142, 1872.) Some ABC city associations publish yearbooks in which they include averages of their member bowlers. (Tr. 88-89.) The GTBA does not have a yearbook but maintains in its files the information which corresponds to the contents of yearbooks and is available to those who wish to inquire. (Tr. 89, 107.)

Mr. Seehausen, Executive Secretary of the BPAA, testified that the basic purpose of a tournament is the promotion of the game and to provide competition for people interested in the game, as well as to create an interest in the game, just as in the case of any other business which puts on a sale or promotion to stimulate interest and trade. (Tr. 143, 385.) A tournament is one way to promote the game in general and to keep interest in it alive. It stimulates interest in competition and is an attraction for non-bowlers as spectators. (PX 227; Tr. 2098.) It is also a way of thanking customers for their patronage. (PX 182, 227.)

BPAA has eight annual tournaments which are held in different principal cities throughout the United States. (R. 95-6.) A number of them involve local elimination or qualifying events. Those that have such events are held in most states although some are not. The principal BPAA tournament, the All-Star Tournament, has qualifying events held in most states. (Tr. 144-5.) In 1963, BPAA awarded approximately $365,000 in prizes for its annual tournaments. (Tr. 145, 2746.) Two of these tournaments are partly conducted each year in the State of Washington. (R. 95-6.)

In general, only a small number of bowlers (Tr. 1839, 2328-9), usually the better than average bowlers, want to compete in tournaments. (Tr. 365.) There is only limited participation in national tournaments. (Tr. 2125.) Only five to ten percent of all bowlers bowl in tournaments in Washington. (Tr. 2116.) Participants in tournament bowling are generally members of one or more leagues. One of the principal inducements to any bowler to participate in organized league bowling is the prospect of participation in one or more bowling tournaments. (Tr. 143.) In recent years, about 500,000 league bowlers have participated annually in BPAA national tournaments. (Tr. 2746.)

In 1962, a state elimination was held in Washington in which 40,830 men and women bowlers participated and they bowled 152,250 lines in the course of the elimination. (Tr. 2118.) An article in the April 1963 issue of BPAA's publication, *The Bowling Proprietor,* described the benefits of this particular national tournament as "something 'extra' for bowlers who do their bowling in member establishments," as well as an extra promotion vehicle for members and proprietor associations, a means for improved bowler relations, and a lineage builder for each BPAA member. (PX 261-R.)

BPAA has generally suffered a deficit in its national tournament program. (Tr. 2097-8, 2147, 2277.) Part of its dues income is earmarked for its tournament program. (Tr. 2147.) There is evidence that proprietor association tournaments generally are not profitable. (Tr. 1543, 1664-5; PX 225.) The WSBPA tournaments cost that association money each year. (Tr. 2409.) However, the proprietor in whose establishment a tournament is conducted benefits from the lineage bowled by the participants. (Tr. 1665-6, 2119-22; PX 153.) This is another

reason for a proprietor to have a tournament (PX 227), although it is offset at least to some extent by that proprietor's costs in promoting and conducting the tournament. (Tr. 2123.)

The WSBPA sponsors about six tournaments a year. (Tr. 1541-2.) The proprietor in whose establishment the tournament is placed is responsible for screening entries, assisted by the WSBPA Tournament Committee and its Executive Secretary. (Tr. 1542.) These tournaments are primarily publicity vehicles and, overall, do not make a profit for the Association. (Tr. 1613; PX 225.) In recent years, tournaments have been on a decline in Washington. (PX 225.)

Tournament Eligibility Rules.

Plaintiff alleged a part of the claimed conspiracy was the adoption and enforcement of eligibility rules for tournaments sponsored or conducted by proprietors' associations, which made ineligible therefor any bowler who bowled in a non-member establishment.

Prior to June 1951, the only requirement for eligibility to participate in a BPAA tournament was that the bowler had to be an ABC member. (Tr. 201.) In June 1951, the BPAA adopted a rule that in order to be eligible to participate in its All-Star Tournament the bowler had, in addition, to do all his ABC sanctioned league bowling in a BPAA member proprietor's establishment. (Tr. 202-3.) A few years later the rule was expanded to apply to the other BPAA tournaments. (Tr. 203.) Under this rule, a bowler participating in a league in a member house was not eligible to compete in BPAA tournaments if he also bowled in a league in a non-member house. (Tr. 204-5.)

In June 1960, the rule was expanded to include tournament as well as league bowling. However, the rule expressly provided that participation in the annual tournament of any ABC or WIBC affiliated association did not affect eligibility. At that time, the rule was also changed to include advertised exhibition bowling. Thus, at that time, to be eligible for a BPAA tournament, the bowler had to do all his league and advertised exhibition bowling, and non-ABC or non-WIBC tournament bowling, in member houses. Prior to June 1960, the BPAA eligibility rule applied only to BPAA tournaments and qualifying events. At that time, and until June 1961, the rule was made applicable to any tournament conducted by any association affiliated with the BPAA, including any tournaments conducted by either the WSBPA or the POBPA. (Tr. 206, 209, 211-3; R. 163-4.)

In June 1961, the BPAA rule was again changed. The advertised exhibition provision was dropped and each affiliated association was again free to adopt its own eligibility rule for its own tournament, and the rule thereafter applied, as before, only in BPAA national tournaments and qualifying events. (Tr. 216-7.)

The BPAA rule was again changed in September 1963. Thereafter, participation in BPAA national tournaments and qualifying events was offered to all bowlers who participated in the regular bowling program of any organized league bowling in any BPAA member establishment. The term "regular" was defined as bowling in at least two-thirds of the scheduled games of a league at the time of entry into the tournament. Bowlers not otherwise eligible could apply to BPAA for eligibility consideration. (R. 164-5.) Proprietors and employees of non-member establishments have never been eligible to compete. (R. 164; Tr. 222-4; PX 143, 228.)

In and after 1959, the WSBPA also had an eligibility rule applicable to tournaments conducted or sponsored by it, which in substance provided:

> "This tournament is restricted to bowlers who do their league and tournament bowling exclusively in member BPAA houses. Proprietors, stockholders, and employees of non-member houses are not eligible to compete under any circumstances. It is the bowler's responsibility to ascertain if the establishment where he bowls is a member in good standing of the BPAA and he personally meets all eligibility requirements of this tournament." (R. 164.)

On May 10, 1963, the WSBPA changed its eligibility rule to read as follows:

> "If a bowler does his sanctioned ABC and WIBC bowling exclusively in WSBPA establishments, he is eligible to participate in this tournament upon presentation of his certified average card signed by the establishment manager or his authorized representative. The bowler shall otherwise obtain his certified average card from the WSBPA Tournament Eligibility Committee in accord with its rules. Proprietors, stockholders and employees of non-member establishments are not eligible to compete. It is the bowler's responsibility to ascertain if the establishment where he bowls is a member in good standing with the BPAA and that he personally meets all eligibility requirements of this tournament." (R. 165; Tr. 375-384.)

There is no evidence that BPAA had anything to do with the adoption, terms, or enforcement of the WSBPA rule.

Reasons for the Eligibility Rules.

Just as is the reason for the ABC tournament eligibility rule (p. 16 above), the basic reason for the BPAA eligibility rule is that BPAA tournaments must benefit the association's members and their customers who support and

finance these tournaments. Non-members and non-customers do not contribute in any way to the tournaments. (Tr. 1669-71.)

The reasons for the WSBPA eligibility rule are to stimulate bowlers' interest and participation, and to prevent cheating and to keep tournaments honest and above board. (Tr. 385-6, 1655, 1754, 1756, 1871, 2194.) The rule protects the bowler and the proprietor and provides better liaison between proprietors to get the information needed. (Tr. 2086, 2132, 2135.) A bowling proprietor is interested in the average of the bowlers wishing to compete in a tournament sponsored or promoted by the proprietors. (Tr. 109, 1840-1.) It is a general practice in well conducted tournaments to verify the averages of prize winners before awarding prizes. (Tr. 1531.) A person generally cannot participate in tournaments unless he has a certified league average. (Tr. 1840-1.)

Bowling proprietors try to operate their tournaments so that everything is honest and above board. They attempt to make every facet of the game healthy. A tournament was said to be "kind of our showcase." (Tr. 1840.) Proprietors set the rules and regulations for their tournaments on this account. (Tr. 1840, 2084.) Proprietors must also administer the ABC rules for tournaments in their establishments. (Tr. 2397.) The ABC does not assist the proprietors in this. (Tr. 2084.) The format and rules of the tournament must be laid out by the proprietor and submitted to the ABC for approval. Other than sanctioning or approving the tournament, the ABC takes no part in the event. (Tr. 1540-1.)

Professor North testified that in bowling, a sport rather than a product is sold. (Tr. 1936.) The proprietors must see that the sport has a set of standards so that unfair

advantage cannot be taken. The standards and conditions of play must be uniform for all participants. (Tr. 1936-7.) To the extent the eligibility rule is concerned with such a set of standards or rules, this is common and widespread throughout most sports. (Tr. 1937.) In a great many sports, there are conditions to be met and rules and standards the players must satisfy in order to be able to play. (Tr. 1937-8.)

"Sandbagging" is a term referring to a bowler who tries to keep his score or average down so that he will get a better handicap than he deserves and will gain a greater advantage in tournament play. (Tr. 90.) A number of the defendants testified that sandbagging was a continuing problem which the eligibility rule was intended in part to avoid. (Tr. 1529-30, 1708, 1775-6, 2082, 2163, 2360.) There was quite a bit of sandbagging before the eligibility rule was adopted. (Tr. 1024-5.) It was and is a serious problem. (Tr. 1034, 1708-9, 2270.) A "sandbagger" can ruin a tournament. (Tr. 1537, 2132, 2382.) There are many cheaters in the game. (Tr. 1529-30, 1708-9, 1756.) Entries in tournaments have been rejected in cases of "sandbagging." (Tr. 1529-30.)

Hoffman testified that sandbagging was little or no problem. (Tr. 2447-50.) He also testified that he had had one sandbagging incident at Pacific Lanes and referred it to the ABC. (Tr. 2447.) Mr. Stowe, the Secretary of the GTBA, testified that it was difficult to say whether there has ever been suspected sandbagging. However, he added that it causes concern at his Association's meetings and at ABC meetings, and that "we are constantly on the alert for intentional sandbagging." (Tr. 109-10.) The ABC has rules against sandbagging which provide for a

committee in each association for re-rating the average of any bowler who can be shown to be intentionally holding down his average. (Tr. 110; PX 239.)

Mr. Guenther testified for defendants that he was a professional bowler, president of the Northwest Scratch Bowlers Association, and promotional manager for Olympic Lanes, with considerable experience in tournament bowling. (Tr. 2379-81.) He testified that if the word gets around that sandbaggers bowl in a tournament, it hurts the tournament. The proprietors try to get a list of known sandbaggers and send it to the different houses holding tournaments. When these bowlers come in, they are rejected or reclassified. He has reclassified bowlers about six times and has not seen the eligibility rule applied very often in Washington. He thought the rule compared pretty closely to the ABC eligibility rule. (Tr. 2382-4.) They are comparable in that the bowler has to be a member of the ABC before he is allowed to bowl. (Tr. 2385-7.)

Defendant Unkrur testified that the eligibility rule was an attempt by the proprietors to try to improve a condition in the industry regarding tournaments, that they were in the position of not having any single base of action about rejecting or rating bowlers and needed more substantiation so that if they rerated a bowler they would not be subject to an action for damaging someone's reputation. (Tr. 1708.)

A witness for the plaintiff testified to a conversation he had with John Corbett, a WSBPA member, in Seattle sometime in the latter part of 1961 or early 1962. (Tr. 739.) Corbett said, according to the witness, that "the eligibility rule was developed by the membership of the Association for the protection of the people in the bowling business. . . ." (Tr. 740-1.) The witness testified that he

also had conversations with Mr. Cunningham, one of the defendants, about the purpose of the eligibility rule and the substance of what Mr. Cunningham told him was the same as what Mr. Corbett said. (Tr. 742-3.) The witness's conversation with Mr. Corbett occurred after his establishment, Secoma Lanes, had been admitted to membership in the King County BPA. (Tr. 747-8.) The witness had testified that the reason he spoke with Mr. Corbett was that he was trying to get in the BPA. (Tr. 737.)

Application of WSBPA Eligibility Rule.

The WSBPA eligibility rule was enforced. (Tr. 101-2, 313-6, 1021-2, 1028, 1037-8, 1057, 1069, 1073-5, 1079, 1654-5, 1711-2, 1754, 2196-7.) The WSBPA Code of Ethics had a provision, in effect since in or about 1957, that in conducting tournaments, the proprietor members agreed to reject all entries of bowlers bowling in leagues in non-member establishments. (Tr. 388, 391-4, 404, 2147, 2424; DX A-73.)

However, the actual number of bowlers who have been declared ineligible and refused participation in a WSBPA or local proprietors' association tournament in Washington because of the rule is not clear. Although he is secretary of the GTBA, Mr. Stowe could not put his finger on any particular bowler who had been disqualified. (Tr. 114.) Hoffman testified he did not know how many bowlers were declared ineligible because of the rule and could name only ten persons affected by the rule in addition to his witnesses in this case. (Tr. 1176, 1195.)

Proprietors testified that only a few persons were declared ineligible at any tournament at their establishments (Tr. 1711-12, 2174, 2272-73, 2354, 2360, 2383.)

One proprietor testified for the plaintiff that he lost business in his establishment because of the rule after he let his dues expire and was no longer a member of the proprietors' associations. (Tr. 791½.) Another testified to the same effect. (Tr. 749-50, 752.) Mr. Surina, another proprietor, testified he was not too successful in attracting league play to his house, the Downtown Bowl, because of many reasons. One of them is the problem that his house was not a BPA member. He also had a parking problem, an older house, and no automatic equipment. He is not a BPA member because it costs too much to join. (Tr. 331-3.)

Mr. Kennedy, another proprietor, testified his house, the Coliseum Bowl in Tacoma, was in very run-down condition, only semi-automatic when he purchased it in 1958. It had no league play and open play was down to 30 lines a day. He became a BPA member about a year after this. In the meantime, he had built the business up, had several leagues, and had increased his open play. (Tr. 415-9, 439.) The eligibility rule was not mentioned as an obstacle to his building up his business. About three years later, well after he joined the BPA, he went out of business. This was because of the competition between the old and new houses. "We just couldn't keep up with them." (Tr. 440.) Since he was then a member, the rule apparently did not succeed in keeping him in business.

Another proprietor witness for the plaintiffs, who has never been a BPA member, testified the rule had no effect to speak of in her establishment. (Tr. 806.)

Fourteen witnesses testified for the plaintiff that they had been declared ineligible because they did not satisfy the eligibility rule as a result of their bowling in a league or leagues in Pacific Lanes after the 1960-61 season. (Tr. 317-23, 473, 475, 490, 500-2, 510, 518, 532, 665-7, 680, 690, 771, 776, 812.) However, most of these witnesses con-

tinued to do their league bowling at Pacific Lanes regardless that this meant they were not eligible for proprietors' tournaments. (Tr. 473-6, 490, 504, 665-8, 683, 688, 703, 771, 785, 816.) Some testified they bowled at Pacific Lanes because of the rule. (Tr. 771, 785.)

One effect of the eligibility rule is that bowlers wanting to participate in proprietor association tournaments were attracted to member establishments. (Tr. 387-8, 447, 679, 705.)

On the other hand, there is also evidence that non-member proprietors were successful in building leagues in their houses (Tr. 439), and that as a non-member of POBPA, Pacific Lanes was also successful in forming leagues after the 1960-61 season. Pacific Lanes had more leagues at the time of the trial than it had when it was a member. (Tr. 1184.) Mrs. Adams testified for the plaintiff that she was able to form a "nice league" of ten teams at Pacific Lanes in 1962. (Tr. 446-7, 458.) Another of plaintiff's witnesses testified similarly about a league in the 1964-65 season. (Tr. 465-8, 470.) Other of plaintiff's witnesses testified that there are many housewives' leagues at Pacific Lanes (Tr. 691) and that there was always someone waiting to get in the women's leagues at Pacific Lanes. (Tr. 534.) Defendant Redig testified some of his leagues at Bowlero Lanes moved to Pacific Lanes. (Tr. 1743.) This was corroborated as to at least one such league. (Tr. 1375.) The rule did not prevent Pacific Lanes from obtaining its initial leagues and business when it first opened, prior to becoming a POBPA member. (Tr. 1187, 1375.)

There is evidence that the eligibility rule had some effect on increasing POBPA membership. (Tr. 231, 363-4, 419.) However, the rule had nothing to do with Pacific Lanes becoming a member. (Tr. 1193.) Mr. Hoffman testified

he never heard of the eligibility rule until after Pacific Lanes resigned. (Tr. 583, 1187-8, 1193.) He could recall no discussion about the rule at POBPA meetings. (Tr. 1187-8, 1193.)

Although none of this was in any way connected with Pacific Lanes, there are some Canadian bowlers who travel from British Columbia to bowl in tournaments in Washington. Over defendants' several objections, particularly hearsay (Tr. 1092-8, 1109-10, 1242), the Court permitted a witness for plaintiff, Mr. Grant, to testify that about 3,000 Canadian bowlers cross the border to bowl in tournaments held in Washington each year and that this "traffic" has been "down considerably" since 1963 because of the eligibility rule. (Tr. 1086-7, 1089, 1092, 1095-7, 1107.) As we note below, Grant's estimate was incompetent and should not have been admitted.

Mr. Kuckenbecker testified for defendants that he is not connected with tournaments run by the defendants, that he conducts tournaments in Washington as his profession, and that he has conducted tournaments in Seattle, Vancouver, Spokane and Bellingham. (Tr. 2302-3, 2308.) Over 7,000 individual bowlers participated in the All-Coast Tournament in the 1963-64 season, a team tournament not sponsored or conducted by any BPA, which is the third largest tournament in the United States, held at Vancouver, Washington. Of these, 135 or 140 (or about 2%) were Canadians (Tr. 2303-6), about 40-45% were from Washington, about the same percentage from Oregon, about 2% from California, and the rest from elsewhere. (Tr. 2315-6.) This tournament has both scratch and handicap events and lasted 11 months. (Tr. 2303.) Mr. Kuckenbecker estimated about 300 Canadians bowl each year in tournaments in Washington.

(Tr. 2310.) They do so more than once so they probably account for a total of 1,000 entries. (Tr. 2313.) He never enforced the eligibility rule on Canadian bowlers (Tr. 2311), and never enforced it at all except in the case of 15 bowlers from Montesano, Washington, in the All-Coast Tournament. Here, however, he sent them applications for the eligibility card and they returned them and then bowled in the tournament. (Tr. 2311-2, 2317.)

One of the defendant proprietors testified a "very liberal" number is 150 or 200 Canadians per year. (Tr. 2107-8.) Other proprietors testified to exceedingly small numbers of Canadian bowlers participating in their house tournaments in Washington. (Tr. 2347, 2358-9.)

There was testimony from plaintiff's witnesses about individual instances where bowlers sought to apply for a certified average card or "eligibility waiver" under the provisions of the 1963 WSBPA rule, but were unsuccessful for several reasons: application blanks were not available (Tr. 570, 641, 722, 785, 885), or they were too much bother and too difficult to fill out. (Tr. 454-5, 503, 660, 879.) One said he had not been told about applying for the card. (Tr. 477-8.)

On the other hand, some of plaintiff's witnesses testified they bowled in tournaments without getting the certified average card, even though they were otherwise ineligibile, or that they had no trouble getting the card within 2-3 days. (Tr. 814, 886-7.) Mr. Corbett, current WSBPA president, testified the certified average card was absolutely not a device to keep people from bowling in a non-member house. (Tr. 379-80.) James Gaines, chairman of the WSBPA tournament committee (Tr. 1765-6), testified that his committee has functioned with regard to the eligibility rule

since the summer of 1963. Since then, it has processed applications for certified average cards of bowlers otherwise not eligible, who wished to participate in WSBPA member house tournaments. About 5 of 35 applications have been rejected, because not properly filled out or received too late. The other applications were granted and the cards issued. He could not recall any instance where the committee's action on the application and the issuance of an eligibility card has taken longer than ten days in practice. (Tr. 1771-2, 1778.)

Prices.

Plaintiff also alleged as a part of the alleged conspiracy an agreement by the defendants and others, including BPAA, to fix and stabilize prices charged for bowling. Plaintiff claimed no injury on account of this part of the alleged conspiracy. (Tr. 1176.) Consequently, to the extent necessary to this appeal, we treat the evidence concerning prices in the Argument.

Overbuilding.

Another part of the alleged conspiracy is the alleged agreement of the defendants and others, including BPAA, to limit and restrict the number and size of establishments by preventing persons from building and by soliciting the manufacturers and others not to deal with such persons. Since plaintiff expressly disclaimed any injury to its business on account of this part of the alleged conspiracy (Tr. 170, 176, 1175-7, 1248-9, 2043-8), we shall, to the extent necessary to this appeal, review this part of the evidence in the Argument.

Alleged Damages.

Notwithstanding allegations in its complaint, plaintiff acknowledged at the trial that its alleged damages were based solely upon the loss of profits because of the alleged effect of the eligibility rule.

Mr. Hoffman testified since the end of the 1960-61 season, Pacific Lanes' business has decreased each year. In the three seasons since then, no league has moved into Pacific Lanes from another house. (Tr. 1127-1147.) They have advertised and improved the appearance of Pacific Lanes. (Tr. 1127-9.) After withdrawing from POBPA they had two tournaments to promote business. Neither was a success financially. One was not subject to the eligibility rule but it still was a loss. (Tr. 1129-30.) He also testified Pacific Lanes lost five leagues due to the eligibility rule and that he made a computation of the loss of profits from that cause. (Tr. 1130.) He included in his computation only the leagues that "definitely pulled out that we had spots available for" for which the eligibility rule was the reason given by the league secretaries. (Tr. 1131-2.) This evidence is reviewed below.

Over defendants' objections that plaintiff was not entitled to recover for damages sustained after the complaint was filed, on December 6, 1961, the Court permitted plaintiff to introduce evidence of alleged losses in profits suffered in three bowling seasons, 1961-2, 1962-3, and 1963-4. Plaintiff's exhibit 259 calculated the items and net amounts of alleged lost profits, as follows:

League and Tournament	*Loss*
1961-62	
City tournament	$ 2,408.93
Invitational league	1,731.84
Total	4,140.77
1962-63	
Invitational league	1,731.84
Women's invitational	1,731.84
Tacoma commercial league	1,731.84
Plywood league	1,231.88
Total	6,427.40
1963-64	
Invitational league	1,797.12
Women's invitational	1,797.12
Olympic league	2,164.80
Plywood league	1,284.10
Total	7,043.14
Total — three seasons	$17,611.31
Other	
1961-62	
Day league, open play and other	$10,834.56
1962-63	
Day league, open play and other	10,834.56
1963-64	
Day league, open play and other	10,834.56
Total — three seasons	32,503.68
Grand Total	$50,114.99

The evidence respecting each of these items is as follows:

1961 City Tournament: Pacific Lanes was awarded the annual GTBA city tournament held in February 1960. According to Hoffman's own testimony, this was the same tournament for which some proprietors, including Hoffman, agreed to submit identical bids. See p. 88 below. In any event, about 3,000 bowlers in 592 teams bowled in the 1960 tournament at Pacific Lanes. (Tr. 92-93.)

The 1961 city tournament was also awarded to Pacific Lanes, some months after it resigned from the POBPA. About 350 teams bowled that year. (Tr. 93-94.) According to Mr. Stowe, the drop in teams was caused "practically all together" because Pacific Lanes was not a POBPA member. (Tr. 94.) In addition, there was an effort by POBPA members to persuade bowlers not to enter the tournament and none of the proprietors sponsored teams for the tournament. (Tr. 95, 98-100.) Plaintiff offered evidence that proprietors told bowlers about the WSBPA eligibility rule and that if they bowled in the tournament, they would lose their eligibility to bowl in proprietors' tournaments. (Tr. 481, 559-68, 647-9, 653, 655, 671-2, 767, 1136; PX 105.) The BPAA eligibility rule did not apply to the tournament because the rule expressly provided that bowling in an ABC or WIBC city association tournament would in no way affect eligibility. (R. 164.)

The awarding of the tournament to Pacific Lanes in successive years was the only time the same house had the tournament twice in a row. (Tr. 435, 653-4.) Many bowlers as well as proprietors complained about this. (Tr. 2088, 2262.) Bowlers who bowled in the 1960 tourna-

ment testified they refused to enter the next year because it was the second year in a row in the same house. (Tr. 2261-2, 2320-1.) The proprietors refused to sponsor teams in the 1961 tournament on this account and did not publicize the tournament in their establishments. (Tr. 2089, 2175.)

Alleged Loss of Leagues: Leagues are organized by the efforts of proprietors and interested bowlers, and have league secretaries who make arrangements for times and places for the league's bowling and obtain other interested bowlers as members to fill out the league's personnel. (Tr. 446-7, 458, 705.)

Some of the characteristics of leagues, at least in the Tacoma area, are that between seasons, leagues move from one establishment to another and have a turnover in members. (Tr. 413, 524-6, 1014, 1164, 1179, 1617, 1743-4, 2103.) Mr. Stevenson testified it was not uncommon for a house to have a 30% turnover in leagues from one season to another. (Tr. 1014.) A larger house may lose as many as six leagues. (Tr. 1617.) A loss of four or five is not uncommon. (Tr. 526, 1743.) The turnover in personnel from one season to another is as high as 35-45%. (Tr. 525, 1744.)

Some of plaintiff's witnesses testified to various reasons why people would not bowl in a particular league, apart from the alleged effect of the tournament eligibility rule. These reasons included inconvenience, wrong day or time of day, engaged in another league or leagues, the bowler is cutting down on his bowling, the establishment is not in the bowler's part of town, or lack of interest in the league itself. (Tr. 447-8, 676, 705-11.)

Pacific Lanes has 30-some night leagues and a total of 58 leagues day and night. (Tr. 1147-8.) They formed or built 50 of them since they left the association. The other

eight came from existing houses while they were still in the association. (Tr. 1148.) It has been successful in building leagues. Hoffman admitted Pacific Lanes was successful forming leagues and could have more leagues as of the time he testified than when it left the association. (Tr. 1150, 1152, 1184.) Hoffman did not believe this was a factor in determining his alleged damages. (Tr. 1184.)

The evidence is as follows respecting the leagues allegedly lost by Pacific Lanes:

Pacific Invitational League: This league was a scratch league of better men bowlers invited to participate which bowled at Pacific Lanes on Wednesdays at 9:00 P.M. in the 1960-1 season. It had 8 teams of 5 men each. A meeting of the league was held at Pacific Lanes in August 1961 to discuss the coming 1961-2 season. Mr. Stevenson and Mr. Tadich were there at the time. Tadich told some of the bowlers he wanted them to come to his place and stressed the eligibility rule. He said if they bowled at Pacific Lanes they wouldn't be eligible for tournaments. After that, the league had two more meetings. Each time there were fewer bowlers and it finally disbanded and broke up. (Tr. 461-4, 637-9, 973-81, 1189.) Mr. Stevenson testified, over objection, that the league voted to bowl at Pacific Lanes provided it rejoined the POBPA. (Tr. 973-4, 981.)

Plaintiff claimed the loss of revenue from this league for each of the three seasons. (PX 259.)

Hoffman testified he tried to revive this league and get it going and he had meetings, but it didn't happen. (Tr. 1178.) Except for this, for which no time or reason was given, and assuming the league existed in later seasons, there was no evidence that it would have bowled

at Pacific Lanes in any season after the 1961-2 season but for the eligibility rule. Hoffman testified he took the total number of bowlers in the Invitational League, and determined the total lines they would have bowled that season. Then he applied the league price per line and added in other income on the same basis as the City Tournament. Then he deducted expenses and arrived at the alleged net loss of $1,731.84. (Tr. 1138-9; PX 259.) He did the same computation for each of the next two seasons. He still had the time open for that league in each of those seasons. (Tr. 1139, 1141.) The 1963-4 season net loss is slightly higher because their league rate was raised 5¢ that year. (Tr. 1142; PX 259.)

The Women's Invitational League: Mr. Stevenson testified that he was forming this league for the 1961-2 season, and that by about 2-3 weeks before the season started, he found enough bowlers to form the league provided Pacific Lanes rejoined the association. They decided not to bowl at Pacific Lanes because it was not in the association. (Tr. 981-2.) He added that the proposed league had an organizational meeting. More than 40 girls had signed up to bowl by contacting the girl who had been elected secretary of the league. The league's rules and regulations had been formed, and the league had been formed basically since they had elected officers. Probably 20-some were at the meeting. The league was not put together. It never reached completion. (Tr. 1000-1.) Both Stevenson and Hoffman said it is not uncommon for an organization meeting to be held and a league not put together for one reason or another. (Tr. 1001, 1161-2.)

This league was to bowl at the same time as the Men's Invitational League, Wednesdays at 9:00 P.M. (Tr. 1140, 1189.) Hoffman testified that when they found out the

men's league was not going to continue at Pacific Lanes, the women went to New Frontier and started a new league there. (Tr. 1161-2.)

Plaintiff claimed the loss of revenue for this league for the 1962-3 and 1963-4 seasons. (PX 259.) Hoffman computed the loss in the same way as the Men's Invitational League. (Tr. 1140.)

There was no other evidence concerning this proposed league. Assuming it then still existed, there was no attempt by Pacific Lanes to invite the league back after the 1961-2 season and no evidence that the league refused to do so because of the eligibility rule.

With regard to both the men's and women's invitational leagues, through part of the 1963-4 season, there were not enough alleys to handle them because Pacific Lanes formed two other leagues during that season. (Tr. 1369-70, 1415-16.)

The Plywood League: A member of this league, Mr. Krick, testified it had six 4-men teams and bowled at Pacific Lanes in the 1961-2 season. He said that at the end of that season he wanted to move the league because of the eligibility rule. He and five or six of the other bowlers wanted to bowl in tournaments, and except for a couple of dropouts, the league moved to New Frontier Lanes. (Tr. 508-9, 511.) It appears Mr. Krick bowled in the league in spite of the eligibility rule since he also testified he had been declared ineligible for one tournament in the 1960-1 season because of bowling at Pacific Lanes. (Tr. 510.) The league itself came to Pacific Lanes in 1961, after it had dropped its POBPA membership. (Tr. 1178-9.)

The Plywood League still bowls at New Frontier. (Tr. 510.) There is no evidence that it was asked to come back to Pacific Lanes for a later season and refused to do so because of the rule. Mr. Krick no longer bowls in the League. (Tr. 511.) There is no evidence what happened to the rest of the members of the league. Mr. Krick added that he bowls in member houses because the proprietor tournaments are better and he wants to bowl in them. (Tr. 512-3.)

Plaintiff claimed the loss of revenue for the Plywood League for the 1962-3 and 1963-4 seasons. (PX 259.) Mr. Hoffman testified the Plywood League was included in his calculations because they voted to go to the New Frontier because of the eligibility rule. (Tr. 1140-1.) Pacific Lanes organized another league called the North Pacific Plywood League for the 1962-3 season. (Tr. 1375.) He did not testify as to his method of calculation for this league. (Tr. 1141, 1142-3.) The league bowled on Tuesdays during the day. (Tr. 1189-90.)

The Tacoma Commercial League: Mr. Kleinsasser, the secretary of this league, testified for plaintiff that in the 1959-60 season, this league of eight teams of five men each bowled at Pacific Lanes, having moved there from Lincoln Bowl the previous season. At the end of the 1959-60 season, the league voted to move to Villa Lanes because of the eligibility rule. Only six of the teams moved, since two of them would not travel to Villa. One of them moved to New Frontier and the other disbanded. After the 1960-1 season at Villa, they weren't satisfied with Villa and disbanded. It was too far to travel for some members. (Tr. 712-15.)

There was no evidence that the league was asked to return to Pacific Lanes after its season at Villa or that it refused to do so because of the eligibility rule.

Notwithstanding Mr. Kleinsasser's testimony that the league moved from Pacific Lanes at the end of the 1959-60 season, when it was still a POBPA member, plaintiff claimed the loss of revenue for this league for the 1962-3 season. (PX 259.) Mr. Hoffman testified that the Tacoma Commercial League was included in his revenue loss calculations for the 1962-3 season since they moved to Villa because of the eligibility rule. (Tr. 1140.) He did not testify as to how the rule could have caused a league to move from one member house to another, nor as to the method by which he calculated his alleged loss based on this league. (Tr. 1140.) He did not include this league in his calculations for the 1963-4 season because the spot had been filled with another league. (Tr. 1143.) In the 1962-3 season, Pacific Lanes was six lanes short of being able to accommodate this league because another league had been organized. (Tr. 1372, 1416-17.)

The Olympic League: This league moved to Pacific Lanes shortly after it opened in 1959, before it became a POBPA member. (Tr. 1375.) Mr. Ehly testified that when the league had its pre-season organizational meeting a few weeks before the 1963-4 season, he said they would have to elect someone else in his place as an officer, because he was going to drop out and not bowl at Pacific Lanes that year. Then his team decided that if Ehly wasn't going to bowl they wouldn't bowl either, and finally the league disbanded. (Tr. 520-2.) Ehly dropped out because he liked to bowl tournaments and the only way he could was by not bowling at Pacific Lanes. (Tr. 521-2.) He also had bowled in the league in spite of the rule, since he had been told as early as 1961 that he was ineligible for tournaments because he bowled at Pacific Lanes yet continued to do his league bowling there. (Tr. 518.)

There was no evidence about the numbers of teams or bowlers in this league. There is no evidence as to what the other members of the league did, other than when they disbanded they quit bowling at Pacific Lanes and moved all over town. (Tr. 522.) There is no evidence that they were asked to continue on at Pacific Lanes in other leagues and refused because of the eligibility rule.

Plaintiff claimed the loss of revenue for the Olympic League for the 1963-4 season. (PX 259.) Mr. Hoffman testified the Olympic League was included in the alleged 1963-4 season losses since the league disbanded because of the eligibility rule. (Tr. 1142.) He did not go through his calculations for that league. (Tr. 1142.)

Alleged Loss of Open Play and Other Business: In addition to the specific items of alleged damages, Mr. Hoffman testified that in each of the three seasons, Pacific Lanes suffered a general loss of profits from open play which included day leagues, open play, tournament bowling, work that league bowlers would do and the number of teams and individuals that left. He made a "conservative estimate" of this. (Tr. 1132, 1143, 1146.) He thought it could have been considerably more. (Tr. 1146.) It has been very difficult to organize day leagues. These are housewives' leagues. (Tr. 1143, 1164.) There is no evidence, however, that any particular housewives' league left Pacific Lanes.

To calculate this alleged loss Hoffman tried to break it on a per-lane basis and found a "conservative estimate" would be two lines per lane per day.

Mr. Hoffman was asked about how he arrived at the two lines per lane figure, and he testified as follows:

1156 "Q. How did you determine two lines per day per lane as being your loss of open play?

"A. I tried to break it down to a per-lane basis.

"Q. Why two lines; why not five or ten, or one or none?

"A. Five would be better.

"Q. Why didn't you use five?

1157 "A. I tried to be conservative.

"Q. Well, wouldn't it be even more conservative to use one?

"A. Probably.

"Q. How did you determine the figure, is what I am trying to find. What basis did you use?

"A. To break it down to a per-line basis?

"Q. Yes.

"A. I took a figure of an approximate amount of lineage that I thonght we would lose, the amount of dollars, and broke it down to a per-line basis because your bowling rate was on a per-line basis.

* * *

"Q. What factor did you use in determining the business that you anticipated that you didn't receive?

"A. Used tournament play, for instance, practice lines, day leagues.

"Q. How were these related then to the two lines per day?

"A. They are related in the amount of dollars and the lines they would bowl, and broken down in a per-line basis.

"Q. Again, why not five lines instead of two?

"A. I just didn't think that would be fair.

"Q. And is there anything other than your speculation as to the amount of open play you would have had?

1158 "A. I have no way of proving I would have had a certain number of lines.

"Q. Do you have any way of knowing?

"A. I can only estimate.

"Q. And the figures that you have given are estimates?

"A. That is correct.

"Q. And the sole basis that you have for that is what you have now testified to?

"A. That is correct.

"Q. Are you sure that there are no other factors that were considered in your reasoning processes to arrive at that?

"A. I don't believe so."

He did not consider the business trends in bowling in Tacoma, or the population trends, or the business done by other proprietors. (Tr. 1158.) He did not know or take into consideration whether the bowling business in Tacoma has been improving or becoming worse. (Tr. 1158-9.) He did not consider the number of bowlers in Tacoma, or whether there has been an increase in bowler participation in the area, or whether there was a lack of interest in tournaments. (Tr. 1159.) He supposed there could be some connection between these factors and whether or not his business should have improved at a greater rate than it did, "if you could tie it in some way." (Tr. 1159.)

Mr. Fisher, a C.P.A., assisted Hoffman in computing damages. (Tr. 1184-5, 1211.) Hoffman supplied the information on the tournaments and leagues that were lost, number of lines bowled by each league, the number of bowlers, length of season, and league prices. Hoffman and Fisher worked together to determine the amount of other income and of expenses. Then Fisher did the com-

putation based on what Hoffman told him. (Tr. 1185, 1211-2, 1421-2.)

Hoffman testified Fisher did not make any independent investigation of the information given him. (Tr. 1185.) Fisher testified that he was asked to prepare a schedule of losses of bowling and the dollar amounts of the losses, and that he prepared PX 259. (Tr. 1211.) He said he investigated to see that there was room for the leagues on the various periods if they had come back to the house. (Tr. 1212.) What this amounted to, however, was Fisher went through with Hoffman the time periods in the various days and came up with the finding from Hoffman that there were times available for the leagues. In one or two instances leagues were formed later in the season in these time spots but there were other times available and they could just as well have gone into those spots. (Tr. 1220.) Fisher also used statistical information to see that the expenses allocated and the other income were fair. (Tr. 1212.) That is all he did independently. (Tr. 1212.) Fisher also explained how he made the calculations on PX 259. (Tr. 1215-20.) In none of the three years was the house full for the entire week. (Tr. 1220.)

On cross-examination, Fisher testified they did not take into account in computing alleged league losses that there could be no open play during that time spot. Fisher presumed Mr. Hoffman took this into account in computing the other alleged losses. (Tr. 1224.) Fisher had no knowledge whether bowlers were on the lanes when the Invitational League stopped bowling. (Tr. 1224.)

Pacific Lanes has also been successful in enlarging its open play. (Tr. 1151.) Most of the good bowlers in Tacoma bowl open play and "pot" games at Pacific Lanes. (Tr. 469-70, 640, 642, 726.) Defendants' evidence is that

there is a relationship between open and league bowling, in that as the volume of one decreases in a particular house, the volume of the other tends to increase. Thus, a drop in the volume of league bowling in a particular establishment, as claimed by Pacific Lanes, finds an increase in open bowling at that house. (Tr. 1388-9, 1458-9.) Pacific Lanes maintains records of its open play business. (Tr. 1151, 1373.) They show its open play has increased since it dropped out of the BPA. (Tr. 1388-9.) Notwithstanding this, Mr. Hoffman said he couldn't say whether it has increased since they dropped out of the association. "Maybe we increased it for a week or over a season." (Tr. 1151-52.) Hoffman was asked by his attorney whether there was ever a day when he did not have lanes available for open play and he answered: "Sometime during the day we do, yes." (Tr. 1198.)

Bowlero and New Frontier are the establishments most comparable to Pacific Lanes. (Tr. 1313-15, 1444, 1464, 1478, 1508, 1726-27, 1885-1903, 1944, 1995.) Bowlero was said to be the finest house in the State. (Tr. 2413.) Mr. Hoffman in the Fall of 1961, suggested that these three more modern houses form their own association but this was not done. (Tr. 1747.) Defendants' evidence is that Pacific Lanes' business since it dropped its membership has been substantially comparable to those two houses and better than the other older houses in Tacoma. (Tr. 1384-5, 1441-4, 1448-53, 1457-9, 1474-5.) In 1963, Pacific had fewer total leagues than Bowlero and New Frontier. (Tr. 1485.) It is the only one of the three which declined in business in both 1962 and 1963. (Tr. 1489-90.) Bowlero and New Frontier are the only houses in Tacoma which showed some increase in business in the 1961-63 period. Both increased 5% from '61 to '62. Then, in 1963, Bowlero declined to about the '61 level and New Frontier

increased a fraction. (Tr. 1507-8.) The latter house bucked the trend because it was a new house still coming into the market and it probably reached its peak in 1963. (Tr. 1946.) Professor North concluded that the entry of these two new houses into business had the effect of cutting into Pacific Lanes' business. (Tr. 1995.) Notwithstanding, Pacific Lanes earned more during the period 1960-63 than any other house and if it were to recover its claimed damages of $50,000 it would have earned more than twice as much as the next highest house. (Tr. 1386-7, 1991-2.)

Professor North also testified that in Tacoma, the bowling industry is a highly competitive industry with the three largest houses doing a little better than the rest but having a rough time of it. (Tr. 1939, 1952.) He found no evidence that any one house has been discriminated against or that Pacific Lanes suffered any loss. (Tr. 1952, 1959.)

Pacific Lanes' rental payments to AMF are down about $3,000 per year for 1962-1964, based upon a total of 118,290 lines times an 8¢ per line rate. (Tr. 1200-1.) Pacific Lanes' books and records show a greater number of lanes bowled than it reported to AMF incident to its rental payments. Hoffman said the lineage meter broke down periodically. (Tr. 1375-6.)

SPECIFICATION OF ERRORS.

1. The boycott instructions given by the Court were erroneous. After defining what constitutes an unreasonable restraint under the Sherman Act, the Court charged the jury as follows: (Tr. 2773-4):

> "There are certain agreements or practices which, because of their adverse effect on competition are conclusively presumed by law to be unreasonable; these are therefore unlawful regardless of the surrounding

circumstances. Among these practices, which are unlawful in and of themselves, are price fixing and group boycotts.

"For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

Defendants objected to the boycott instructions on the grounds that the eligibility rule is not a boycott subject to the Sherman Act because that act relates only to commercial boycotts, and these instructions did not include defendants' theory that they have a right to establish reasonable rules to regulate their tournaments. (Tr. 2023-5, 2026-33, 2804-5.)

2. In connection with the boycott instructions, the Court erroneously refused to give the following requests of the defendants. (R. 238.)

No. 23: "Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff."

No. 27: "If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations regarding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not constitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States."

3. The award of $35,000 actual damages is grossly excessive because:

(a) The Court erred in overruling defendants' objection to evidence of any alleged damages incurred after the date the complaint was filed, December 6, 1961. (Tr. 853-4, 1141.) Most of plaintiff's alleged damages occurred after the filing date. Defendants also tendered an instruction, request number 22, which was refused by the Court, limiting any alleged injury to plaintiff to the period between its resignation on October 15, 1960 to the filing date (inadvertently described as December 7, 1962 instead of December 6, 1961). (R. 69.) Instead, in accordance with plaintiff's contention, the Court instructed the jury that plaintiff could recover for damages suffered between the date of its resignation and the end of the 1963-4 bowling season. (Tr. 2782.) Plaintiff's damages should properly have been limited to those occurring before December 6, 1961.

(b) The evidence does not support the award. Both the fact and the amount of damages were based upon speculative evidence.

4. The evidence is not legally sufficient to support the verdict that either the interstate aspects of plaintiff's business or interstate commerce were affected by the eligibility rule or by any other aspect of the alleged conspiracy.

5. The Court erred in admitting Mr. Grant's testimony regarding the alleged effect of the eligibility rule on interstate commerce. Over objections that his testimony was speculative and hearsay (Tr. 1089, 1092-10, 1241-2), Mr. Grant testified that about 3,000 Canadian bowlers come to Washington to bowl in tournaments and that since 1963, this has dropped considerably because of the eligibility rule. (Tr. 1086, 1089, 1095-7, 1107.)

ARGUMENT.

I.

SUMMARY OF ARGUMENT

The Court erred in charging the jury that the tournament eligibility rule was a group boycott, and therefore, a *per se* violation of the Sherman Act. The boycott instructions were not applicable in this case. The eligibility rule is not a commercial boycott in the *per se* category. Whether or not the eligibility rule violates the Sherman Act properly depends upon the application of the rule of reason rather than any *per se* rule. The boycott instructions were clearly prejudicial because they directed the jury to find the eligibility rule to be a *per se* violation, without regard or consideration for defendants' evidence concerning the justification for and reasonableness of the rule. The error in giving the boycott instructions was compounded by the failure of the Court to give requests by the plaintiffs under which the jury would have considered the defendants' evidence in justification and support of the rule. This error also substantially prejudiced the defendants in their defense of the claimed violation of Section 2 since by the boycott instructions the jury was directed to disregard the defendants' evidence bearing upon a necessary element of

such a claim, *i.e.*, whether the defendants acted from legitimate business aims or, instead, with the specific and subjective intention to monopolize the bowling business in Tacoma.

The damages were grossly excessive. The award of $35,000 actual damages necessarily included in substantial part profits allegedly lost by the plaintiff because of acts committed after the date the complaint was filed. Plaintiff is not entitled in this case to recover any damages based upon acts occurring after the filing date. The Court erred in admitting evidence of alleged damages based upon acts which occurred after that date. In addition, and equally important, the evidence of damages is purely speculative both as to the fact of damage as well as to the amount of damage allegedly suffered.

The evidence was not legally sufficient to support the verdict that the eligibility rule had the requisite effect upon interstate commerce. The rule was not shown to have had a substantial effect on any interstate aspect of plaintiff's business, nor was it shown to have affected interstate commerce in general. The only effect the eligibility rule could have in this case is as to where local residents in Washington will pursue a part of their recreational bowling. The fact that some out-of-state bowlers may have been affected is not the direct and substantial effect on commerce which is required for a violation of the Sherman Act. In this connection, the only evidence that the eligibility rule even affected out-of-state bowlers was the testimony of Mr. Grant regarding Canadian bowlers, which was incompetent because it was hearsay.

The other aspects of the alleged conspiracy do not aid plaintiff's basic claim that the eligibility rule violates the Sherman Act. The alleged fixing of the price of bowling

is not supported by competent and sufficient evidence and even were agreements on price deemed established by the evidence, they could only be local agreements not shown to have had any effect, let alone the requisite effect on interstate commerce. The alleged overbuilding activities were not connected with the eligibility rule and were not shown to be a part of the same conspiracy as that which allegedly produced the eligibility rule. Consequently, plaintiff cannot rely on any of these other aspects as proof that the eligibility rule had the necessary effect upon commerce.

II.

THE COURT ERRED IN CHARGING THE JURY THAT THE ELIGIBILITY RULE WAS A GROUP BOYCOTT AND, THEREFORE, A PER SE VIOLATION.

The eligibility rule was the only circumstance in this case to which the boycott instructions could pertain. The effect of these instructions, set forth above (pp. 45-46), was to direct the jury to find that the eligibility rule was a group boycott and a *per se* violation, and consequently the jury had no choice but to find the defendants guilty under both Sections 1 and 2.

This was error, for several reasons: First, the instructions were not applicable in this case unless the eligibility rule was in fact a group boycott in the *per se* category. The rule is not such a boycott, and the jury should not have been instructed that it was. Second, the factual issue whether or not the evidence established that the rule was a group boycott was withdrawn from the jury. They were flatly told it was a group boycott and a *per se* violation. Third, whether or not the rule violates the Sherman Act properly depends upon the application of the rule of reason.

A. The Rule Is Not A Commercial Boycott.

It is axiomatic that there can be no violation of the Sherman Act, and its proscriptions against restraints of trade, unless a trade or business is affected. As the Restatement of Contracts states (Section 513, Comment a):

> "The term 'restraint of trade' relates to limitations of business dealings or professional or other gainful occupations. A contract restricting a promisor from playing golf as an amateur . . . is not in restraint of trade."

The Sherman Act was adopted to prevent "restraints to free competition in business and commercial transactions. . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1939).

As Judge Wyatt recently stated in *Lieberthal* v. *North Country Lanes, Inc.,* 221 F. Supp. 685, 687 (S.D. N.Y. 1963), aff'd 332 F.2d 269 (2d Cir. 1964):

> ". . . The nature of the sport (or recreation) of bowling is a well known fact of which the Court can take judicial notice."

In the *Lieberthal* case, the Court distinguished the act of bowling from the business of providing or promoting local exhibitions. Judge Wyatt said in part (221 F. Supp. at p. 687):

> ". . . Local exhibitions . . . are in any event to be distinguished from participation on an individual basis in a sports activity such as bowling, swimming, etc. . . ."

As Judge Wyatt added, the individual bowler "entertains himself; he is not entertained by the exhibition of persons or apparatus gathered in interstate commerce." 221 F. Supp. at p. 688.

Consequently, it is perfectly obvious that the act of bowling is the act of participating in a game or recreation. It is not a commercial pursuit or the transaction of a business. Except for a professional bowler, it is not and cannot be an occupation or gainful employment.

With the foregoing in mind, it is pertinent to note certain basic factors regarding the eligibility rule.

First, the rule is not a refusal to deal commercially. It is at most only a "refusal" to allow an ineligible bowler the privilege of bowling in a particular tournament as an additional part of his recreational pursuits. In itself, the ineligibility of a bowler because of the rule has no commercial ramifications whatsoever.

Second, the rule does not involve any coercive element whatsoever. Nothing in it does or could force a bowler to do something he does not want to do. Nothing in it does or could restrain the freedom of the bowler to decide independently where he wants to bowl and what kind of bowling he wants to pursue. Nothing in it forces a bowler to bowl or to want to bowl in a BPA tournament. If he wants to bowl in a BPA tournament, then he must qualify to do so, just as in any other kind of a competitive event one can imagine. If he does not want to bowl in such a tournament, that is the end of the matter. The rule is of no interest to him whatsoever. Most bowlers are in this category. If a bowler does not want to bowl in a BPA tournament enough to do what is necessary to qualify, that is also the end of the matter and the rule is of no significance to him. There is absolutely nothing the rule can make a bowler do if he does not want to do it in the first place. Whatever persuasive element the rule may have is not the kind of persuasion the antitrust laws forbid. See *Interborough News Co.* v. *Curtis Publishing Co.,* 225 F.2d 289, 292-293

(2d Cir. 1955) (where the distributors approached by Curtis are analogous to the bowlers here), and *United States* v. *General Motors Corp.*, 216 F. Supp. 362, 364-5 (S.D. Calif. 1963) (where the dealers persuaded by General Motors are analogous to the bowlers here).

Third, the rule has no application of any kind to the primary and most important parts of the sport. The proprietor's patronage is primarily from open play and league bowling. Together, these are the basic source of the proprietor's business. Any bowler is completely at liberty, indeed invited, to bowl in a member proprietor's house. There is not a shred of evidence that the rule or any other thing done by the defendants resulted in their refusing, for any reason, to allow anyone to bowl in open or league play in their houses.

Fourth, tournament bowling is an incidental part of the sport. In general, only a small number of bowlers, usually the better than average bowlers, want to compete in tournaments. Only five to ten percent of all bowlers bowl in tournaments in Washington. There is only limited participation in national tournaments. (P. 18 above.) Moreover, bowling tournaments are conducted by a myriad of sponsors in addition to proprietor associations. There are many tournaments available to the relatively few bowlers who want to include this type of competition in their bowling recreation, further indicating the incidental and narrow effect of the rule. That the rule can have only incidental and narrow effect on bowlers is significant. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 239-240 (1917).

Fifth, plaintiff's witnesses testified the BPA tournaments are the best. So be it. Defendants would not want it otherwise. To be sure, the sponsorship of the best bowling tournaments is bound to make at least some bowlers prefer

them to other tournaments and presumably make at least some bowlers want to patronize the proprietors who help make them possible. But these are but incidentals which at most could be of significance only to bowlers who are interested in tournament bowling. And the basic reason for this is not the eligibility rule, but the excellence of BPA tournaments.

The eligibility rule pertains and has significance, therefore, only to a relatively small part of the bowling public, those who want to include tournament bowling in their recreational pursuits, and then only to those desiring to compete in BPA tournaments as contrasted with the variety of other tournaments available. This part of the bowling public, and such patronage as they may bring to member houses, are only an incidental part of the sport of bowling. Furthermore, the rule has no commercial or economic aspect since it in no way affects the trade or business of those bowlers who are interested in BPA tournaments. And it has no coercive aspect, since it does not destroy, coerce, or affect the independence of bowlers to decide where they want to bowl.

B. Only Commercial Boycotts Can Be Per Se Illegal.

Boycotts illegal *per se* under the Sherman Act are *commercial* boycotts, i.e., concerted action by one trader or group of traders to force another trader or group of traders to do or refrain from doing something with respect to the latter's trade or business. As the court said in *Arzee Supply Corp. of Conn.* v. *Ruberoid Co.*, 222 F. Supp. 237, 242 (D. Conn. 1963):

> ". . . a group boycott . . . is a concerted refusal by traders to deal with other traders. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959). A group boycott is unlawful *per se* because it restrains the freedom of the par-

> ties to the boycott independently to decide whether to deal with the boycotted party. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219 (1951). . . ."

Examples of commercial boycotts illegal *per se* are found in *Fashion Originators' Guild* v. *F. T. C.,* 312 U.S. 457 (1941), *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959), and *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963).

The characteristics of boycotts illegal *per se* shown in the above authorities simply are not present in the eligibility rule.

Authority for this conclusion is found in *United States* v. *U.S. Trotting Ass'n,* 1960 Trade Cases, paragraph 69,761 (S.D. Ohio 1960). The government contended the rules and regulations of the Association amounted to illegal boycotts or concerted refusals to deal in violation of Section 1. The rules in question provided, in part, that horses racing on tracks which were not USTA members or in meets which were not USTA sanctioned were barred from receiving eligibility certificates, which certificates were essential if a horse was to be eligible to participate on member tracks and in sanctioned races. The District Court upheld the Association, stating:

> "Defendant's rules and regulations, singled out by the Government's motion for summary judgment, insofar as they may be called group boycotts, or concerted refusals to deal, are not such commercial boycotts as have been stricken down in previous cases as unlawful *per se.* The Court is not unmindful of *Klors, Inc.* v. *Broadway-Hale Stores, Inc., et al,* (1959 Trade Cases ¶ 69,316), 359 U. S. 207. However, the Court is of the opinion that *Klor's* is distinguishable upon its facts from the instant case in that it, too,

> dealt with such commercial boycotts. Therefore the Court finds that the Government's motion for summary judgment should be overruled."

Further support for this conclusion is found in *United States* v. *Insurance Board of Cleveland,* 144 F. Supp. 684 (N.D. Ohio 1956). With regard to certain rules of the Insurance Board, the District Court concluded that *per se* illegality attached only to group boycotts involving "coercive action against parties outside the group." (See 144 F. Supp. at pp. 696-698.) The Court stated:

> "The construction for which the Government contends holds the *dicta* to be an unqualified condemnation of all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination. Within the all-embracing compass of this construction a group refusal to deal motivated by legitimate business reasons, exerting no coercion upon outsiders and resulting in no unreasonable restraint of trade, would nevertheless be a violation of the antitrust act. The Government's contention goes too far. *Under its interpretation many innocent practices of trade associations which only indirectly affect outsiders and which create no unreasonable restraint of trade would be brought within the ban of the Act* and the alleged offenders denied the opportunity to justify their conduct. Such a construction is squarely in conflict with the Rule of Reason." (Emphasis added.)

After trial, the Court rendered another opinion, again refuting the *per se* contention. 188 F. Supp. 949, 954-955 (N.D. Ohio 1960). The Court noted that after its first opinion, *Northern Pacific Ry. Co.* v. *U.S.,* 356 U.S. 1, and *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 had been decided. After a full discussion of these deci-

sions, the Court reaffirmed its initial decision, in pertinent part stating (p. 955):

> "*Coercive economic pressure affects the degree of restraint and is frequently, if not always, a distinguishing characteristic of concerted refusals to deal that are conclusively presumed to be unlawful.* The presence or absence of such element, therefore, would seem clearly to be relevant to the issue whether the restraint of a concerted refusal to deal is unreasonable *per se* . . ." (Emphasis added.)

See also Rahl, *per se Rules and Boycotts* 45 Va. Law Rev. 1165 (1959).

C. The Boycott Instructions Were Clearly Prejudicial To Defendants.

None of the circumstances in the *per se* boycott cases can be inferred in the case at bar. As we have said, neither the bowler nor his business are coerced or threatened by the eligibility rule. By the nature of things, it is not pressure or coercion, commercial or otherwise, which leads such bowlers as do to prefer member houses. If the rule has the effect of causing a bowler to refrain from league bowling in non-member houses, it is because the bowler wants to participate in BPA tournaments and not because his independence of deciding where he will bowl is destroyed by commercial pressure. The rule is no more than the offer of contests or premiums or trading stamps to encourage people to buy certain products. Non-members are not precluded from competing in the same way, by offering tournaments available only to their league bowlers. Nor are bowlers in any way restrained from bowling in non-member houses. Bowlers lose nothing by virtue of not qualifying for proprietors' tournaments which they have any right to have, or which they "need" to have, or which has any commercial significance whatsoever, contrary to the circumstances in every illegal boycott case we know.

The rule is not even a boycott, let alone a boycott illegal *per se*. No one is or could be forced to bowl in a bowling tournament.

Consequently, the boycott instructions were inapplicable in this case and it was error for the Court to give them.

This Court stated the applicable principle concerning errors in instructions in *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Prod. Co.*, 284 F.2d 1, 23 (9th Cir. 1960) reversed on other grounds, 370 U.S. 19 (1962):

> "Appellees, of course, urge that the instructions must be 'viewed in their entirety, rather than in isolated segments'; that 'even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge,' citing *Jesonis* v. *Oliver J. Olson & Co.*, 9 Cir., 1956, 238 F.2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. . . . ."

The error here was patently substantial and prejudicial. The eligibility rule is the crux of plaintiff's case. The damages claimed are entirely based upon the impact of the rule on plaintiff's business. The instructions caused the jury to find that the rule was a *per se* violation and to disregard defendants' contentions and evidence that the rule was reasonable and lawful.

D. The Error In So Instructing The Jury Was Compounded By The Failure Of The Court To Give Defendants Requested Instructions.

By their requests 23 and 27, quoted above (pp. 46-47), the defendants tendered their theory with respect to the eligibility rule. Throughout the trial, they contended there were several legitimate reasons for the eligibility rule.

(Pp. 21-24 above.) Consideration of this evidence was effectively precluded by the boycott instructions given by the Court.

When requests 23 and 27 were discussed during the conferences on instructions, the Court indicated the plaintiff's requests on boycotts would be balanced by defendants' and the defendants thought their requests would be given. (Tr. 2031-2.) The record does not show any further mention of defendants' requests until the exceptions to the charge. (Tr. 2804-5.)

These requests, or the substance thereof, should have been included in the boycott instructions. Without them, the jury was not given the defendants' theory of the eligibility rule.

In *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), this Court reversed, *inter alia,* because the district court failed to give a requested instruction, and its comments are appropriate to the failure to give defendants' requests 23 and 27 in this case (327 F.2d at p. 465):

> "Lessig tendered to the court a proposed instruction concerning his right to recover reasonably anticipated future profits lost as a result of the cancellation of his lease and contract. The instruction was not given, and Lessig made timely objection. The omission was error. The error was prejudicial since the jury was instructed in detail as to Lessig's right to recover profits lost during his occupancy of the station, and therefore might have concluded that he could recover only on this theory. Such a misconception could have led to the verdict adverse to Lessig, for while Lessig's proof of causal connection between the alleged violation and the lease cancellation was substantial and direct, his proof of loss of profits from Tidewater's conduct during his occupancy of the station was, as we have said, relatively meager and tenuous."

The net effect of the refusal to give the requests in the case at bar, coupled with the giving of the boycott instructions, was that defendants could not lawfully conduct any tournament in which only their customers were eligible. An eligibility rule intended to provide tournaments for customers of the sponsor surely is not a restraint of trade. Whether or not the WSBPA eligibility rule went unreasonably beyond this was a question of fact, to be determined under the customary standard applied in antitrust cases, that the law proscribes only unreasonable restraints. See *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238-239 (1917). The reasonableness or unreasonableness of the eligibility rule was effectively withdrawn from the jury by the instructions given and by the refusal to give the defendants' requests.

E. The Erroneous Boycott Instructions Also Vitiate The Verdict and Judgment Under Section 2.

Because of the erroneous boycott instructions, defendants were also substantially prejudiced in their defense of the Section 2 charge.

Obviously, the defendants have not monopolized the bowling business in Tacoma. They do not control bowling prices in Tacoma nor have they the power to exclude anyone from entering the bowling business in Tacoma, witness the price variations and the influx of new establishments in Tacoma. Without such control and power, monopolization does not exist.

However, plaintiff claimed and the judgment below represents that the defendants attempted to monopolize the bowling business in Tacoma. This requires "proof of a specific or subjective intent" to accomplish that result. *Report of the Attorney General's Committee on the Anti-*

trust Laws, p. 61 (1955); *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 626 (1953).

In its recent decision in *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656 (9th Cir. 1963), this Court affirmed the action of the district court in directing the verdict for defendants and dismissing the action. *Inter alia,* plaintiff alleged a conspiracy and attempt to monopolize trade in violation of Sections 1 and 2 of the Sherman Act. This Court commented upon the Section 2 charges as follows (p. 667):

> "Of course, monopoly power need not be shown in order to warrant a finding of an attempt to monopolize. However, 'where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. * * * (Citation omitted). But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.' *Swift & Co.* v. *United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905).
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> "Thus, to make out a prima facie case plaintiff was required to produce proof that a defendant's acts were not 'predominantly motivated by legitimate business aims' [*Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 626-627, 73 S.Ct. 872, 890, 97 L.Ed. 1277 (1953)], but instead were done in order to gain monopoly power. The acts themselves may be such as to suggest an illegal purpose, or they may require the assistance of additional facts; in either event the intent must be reasonably apparent. Here it is not."

In the case at bar, therefore, there must be evidence to support the inferences that defendants had the specific, subjective intent to acquire the power to fix prices and exclude competitors, and that their acts were not "predominantly motivated by legitimate business aims."

The verdict does not represent the jury's view of the evidence relevant to this element of plaintiff's claim. The *per se* boycott instructions effectively withdrew and precluded the jury from considering any of the substantial evidence defendants offered concerning the background, purposes, and effect of the eligibility rule. In this, defendants were substantially prejudiced with respect to the Section 2 as well as the Section 1 charge.

III.

THE DAMAGES WERE GROSSLY EXCESSIVE.

Since the plaintiff based its alleged damages solely on the eligibility rule and since the Court directed the jury to find the rule was an illegal boycott *per se,* it is no wonder the jury awarded substantial damages in this case. It is appropriate to discuss the damages at this point, having in mind the fundamental proposition that in treble damage cases the gist of the action is legal injury proximately resulting from a violation of the Sherman Act, and not merely the violation itself. See, *e.g. Winckler & Smith Citrus Prod. Co.* v. *Sunkist Growers, Inc.,* 346 F.2d 1012 (9th Cir. 1965.)

Plaintiff sought recovery of $50,000 actual damages, based upon two theories of lost profits. It claimed damages of $17,611.31 based upon loss of profits from specific business, being the loss incident to the 1961 City Tournament and the losses of five leagues during the three bowling

seasons, 1961-62, 1962-63, and 1963-64. It claimed additional damages of $32,503.68 based upon the alleged general loss of profits from open play and day leagues during the same three bowling seasons. See p. 32 above. All of these damages were caused according to the plaintiff, by the eligibility rule.

The jury's award of $35,000 actual damages was not segregated in any way, either as to the plaintiff's two damage theories or as to the time when the damages were incurred by plaintiff. Necessarily, the award had to be predicated in part on each theory of lost profits and had to include damages incurred after the date the complaint was filed, December 6, 1961.

There are two fundamental reasons why the award is grossly excessive and cannot be sustained:

A. The Award Included Damages Based Upon Acts Which Occurred After The Date The Complaint Was Filed.

The decision of this Court in *Flintkote Company* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957), is on all fours with the case at bar. That case was an action under the Federal Antitrust Laws for treble damages against a trade association of acoustical tile dealers, its dealer members, and the Flintkote Company, a supplier of acoustical tile products. Plaintiffs were partners in a tile dealer firm which was a competitor of the member-dealers. Plaintiffs alleged a continuing conspiracy by the defendants whereby Flintkote refused to sell its tile products to plaintiffs which caused injury to plaintiffs' business.

Plaintiffs' complaint was filed July 21, 1962. The trial commenced May 4, 1955. Just as was done in the case at bar, the district court, over objection, admitted evidence

and instructed the jury that it could award damages for injuries incurred up to the date the trial began.

This Court reversed on this point, stating in part (246 F.2d at pp. 394, 395-6):

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages. Thus, it becomes necessary to ascertain whether plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date this action was filed."
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> * * *
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> "This cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct. Indeed, appellees themselves recognized the continuing nature of the conspiracy for in their brief they assert that:
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> > 'At the time of trial it is clear that appellees * * * were still under the competitive limitations resulting from the conspiracy.' * * *
>
> " '[A] conspiracy * * * is in effect renewed during each day of its continuance.' *United States* v. *Borden Co.,* 308 U.S. 188, 202, 60 S.Ct. 182, 190, 84 L.Ed. 181."

This Court recently had occasion to reaffirm these principles in *Independent Iron Works, Inc.* v. *United States Steel Corporation,* 322 F.2d 656, 673 (9th Cir. 1963),

where it stated the plaintiff cannot recover damages except "as were the consequences of the acts of a defendant or the defendants committed prior to the time the complaint was filed. . . ."

The claimed violation in the case at bar is a single continuous conspiracy by the defendants to restrain, and to attempt to monopolize, trade and commerce. This claim is identical in nature with that alleged in the *Flintkote* case. As is apparent from the opinion in *Flintkote,* the continuing conspiracy in the case at bar was in effect a violation of the antitrust laws each day it existed, based upon new acts and giving rise to a new cause of action each day it existed. Thus damages based upon events after the date of the complaint are the result of acts occurring and causes of action accruing after that date.

The largest part of the jury's award must have been based upon acts and claims which occurred after the complaint was filed. The only acts causing injury to plaintiff prior to that time were those incident to the 1961 City Tournament, the alleged loss of the Men's Invitational League in mid-1961, and the alleged general loss of revenue during the September-December portion of the 1961-2 bowling season. The other alleged losses necessarily are predicated upon acts which occurred after the complaint was filed.

Pacific Lanes is not entitled in this action to recover any damages which were caused by the alleged conspiracy after the filing date. In these circumstances, the entire award must fall and a new trial granted. As was noted in the *Flintkote* case, here there also is no "acceptable basis for segregating the damage award" and no supplemental complaint or new action was filed by plaintiff. See 246 F.2d at pp. 396-7.

B. The Damages Awarded Were Not Sufficiently Proved, But Instead Are Predicated Solely Upon Speculative Evidence.

This Court set forth the applicable measure of proof of damages in the *Flintkote case,* 246 F.2d at p. 392:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' *Bigelow* v. *RKO Radio Pictures, Inc., supra,* 327 U.S. at page 264, 66 S.Ct. at page 580. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage."

There this Court concluded that, notwithstanding the *fact* of damage was established, the evidence of the *amount* of damage was "a mere interested guess" on the plaintiffs' part, amounting to speculation, and that the award could not be sustained. In that case, the plaintiffs sought actual damages predicated in large measure on alleged loss of profits. The proof consisted of oral testimony of the two plaintiff-partners and their accountant, supplemented by written computations. Neither of the two partners had had any prior management experience as tile dealers. They had been salesmen for a tile dealer. Their accountant merely performed the mechanical functions of computing figures given to him by the plaintiffs. (See 246 F.2d at pp. 390-

391.) As the Court noted, "the computation of lost profits was based on the assumption that the plaintiffs would make as much working for themselves in their first year of operation as they and their employer . . . made together from their sales in their best year working for that going concern; that hereafter, profits would increase as much as 50% annually." (246 F.2d at p. 391.) There was no evidence that they "would probably have obtained more business if they could have purchased Flintkote tile on a direct basis. . . ." (246 F.2d at p. 391.)

This Court held that this evidence was insufficient, stating (pp. 393-4):

> "We have reviewed the cases most favorable to appellees, but we have been unable to discover any case so fraught with uncertainty as the one at bar, which upholds a jury verdict. This Court only recently cautioned against giving 'judicial blessing to a decision based upon speculation, surmise, and conjecture.' *Wolfe* v. *National Lead Co.*, 9 Cir., 225 F.2d 427, 434. There the District Court's dismissal of an action because of failure of proof of injury was affirmed.
>
> "We recognize the fact that as we examine this feature of the case, injured plaintiffs and a wrongdoing defendant face the court. In such a context the record will not ordinarily be searched with a microscopic eye. Yet something better is required to sustain a jury verdict than a mere interested guess."

Other pertinent decisions of this Court which found evidence of damages in treble damage actions to be speculative and legally insufficient are *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 32-34 (9th Cir. 1960), reversed on other grounds, 370 U.S. 19 (1962), and *Wolfe* v. *National Lead Co.*, 225 F.2d 427, 430-432 (9th Cir. 1955).

In the case at bar, both the *fact* of damage and the *amount* of damages are predicated in substantial part solely upon speculation.

1. **Alleged loss of profits from open bowling and day leagues:** As it is involved in the case at bar, the eligibility rule admittedly had application only to league bowling. Where a bowler did his open bowling was immaterial. Open bowling at Pacific Lanes did not make anyone ineligible under the rule.

Thus, to recover for alleged loss of open bowling on account of the eligibility rule, plaintiff was required to prove some factual basis for its conclusion other than the existence of the rule itself. There is none.

Hoffman testified to his opinion that a decrease in league bowling causes a decrease in open bowling. (Tr. 1149.) There are two reasons why this opinion does not support the award. In the first place, accepting it as true, plaintiff did not attempt to prove and there is no evidence of an overall decrease in volume of league bowling at Pacific Lanes during any of the three seasons, but at most only the loss of the five specified leagues. In fact, the only evidence on this point is that Pacific Lanes could well have a larger number of leagues now than when it left the association. (Pp. 27, 35, 44 above.)

In the second place, not a single fact was offered to support Hoffman's opinion. To the contrary, the only factual evidence in the record is precisely to the contrary. Pacific Lanes itself kept records of its open bowling revenue, and this revenue *increased* rather than decreased during the three seasons for which damages are claimed. This is clear notwithstanding Hoffman himself, who was certainly cognizant of other aspects of his business, attempted to evade admitting this on cross-examination. (Pp. 35, 44 above.)

Moreover, defendants' expert witnesses surveyed the bowling business in Tacoma and concluded that open bowling at an establishment increased as league bowling decreased. (Pp. 43-44 above.) We perceive this is an obvious truism. The greater the league business in a house, the fewer the lanes available for open bowling; the lesser the league bowling, the greater the lanes available for open bowling.

Plaintiff also included the loss of day or housewives leagues as a part of its computation of a general loss of profits from decreased open bowling. Significantly, although plaintiff endeavored to prove the loss of five particular leagues, not a single instance of a loss of a housewives league was shown in the evidence. At most there is some evidence that it has been "difficult" to organize these leagues. (P. 40 above.) Whether or not this has been "difficult," the evidence overwhelmingly shows Pacific Lanes has been very successful in organizing them. (P. 27 above.) Moreover, there is no evidence that the eligibility rule ever prevented the organization of any such league at Pacific Lanes. To the contrary, the only evidence bearing on the point at all is that the housewives in day leagues generally were not interested in tournament bowling.

Defendants submit that there is no evidence to support Hoffman's opinion that the eligibility rule caused a decrease in open bowling or in day league bowling at Pacific Lanes.

But even if the *fact* of such damage were established, still plaintiff was required to prove the factual basis for the *amount* of damages so occasioned.

Here, the amount of damages is based solely upon the testimony of Hoffman and the accountant Fisher. The latter's testimony may be disposed of briefly. Just as

was the case in *Flintkote*, the accountant did no more than the mathematical computation of alleged net losses based upon the information given him by Hoffman. (Pp. 42-43 above.)

Hoffman's testimony is that Pacific Lanes lost two lines of open and day league bowling per lane per day during each of the three seasons. (P. 40 above.) We have related how he arrived at this and the factors he admittedly did not take into account. (Pp. 40-42 above.) It is apparent from his testimony that the two lines figure was no more than his arbitrary guess which he tried to dress up by describing as a "conservative estimate." It is significant, we submit, that at no time was any comparison made between open bowling at Pacific Lanes and open bowling at the two most comparable houses in Tacoma, Bowlero and New Frontier. If the eligibility rule did cause a drop in plaintiff's open bowling, presumably those houses would have enjoyed better open bowling than Pacific Lanes since both were members and the rule could not have adversely affected their businesses. It is equally significant that no consideration was given to the fact that the bowling business in Tacoma was on a general decline in each of the three seasons. Notwithstanding this, plaintiff still claimed the identical amount of loss of open and day league bowling in each of these seasons. (P. 32 above.)

This Court reversed an award predicated upon "a mere interested guess" in the *Flintkote* case. This result is equally appropriate here with respect to the unknown but necessarily substantial part of the award based upon the alleged general loss of profits from open and day league bowling.

2. **Alleged Loss of Profits From League Bowling:** The circumstances with respect to the five leagues are not significantly different. There are several reasons why the *fact* of damage was not established.

First, assuming *arguendo* that each of the five leagues in fact moved from Pacific Lanes, and that plaintiff is entitled to damages for the season in or just before which the leagues moved, there is nevertheless no evidence that any of the three leagues for which more than one season is claimed (Men's Invitational, Women's Invitational, and Plywood) stayed away from Pacific Lanes in the subsequent season or seasons because of the eligibility rule. In view of all the evidence concerning league practices in Tacoma (p. 34 above), it is apparent that each bowling season is a new leaf, so to speak. Once signed up, a league is contractually obligated to remain in the bowling establishment until the end of that season. But at that time, leagues are free to and in fact in substantial numbers do move to different establishments for the next season. Moreover, substantial numbers of the bowlers in a given league drop out from season to season. It is sheer speculation to assume that in a later season a league is comprised of the same bowlers as it was previously and that each of them is motivated in determining where the league should bowl by the same factors which entered into a previous decision.

There is no evidence that either the Men's Invitational League or the Women's Invitational League even existed, anywhere, after the 1961-62 season, yet damages are claimed for each for the two subsequent seasons.

Moreover, even if these two leagues did exist subsequently, there is no evidence in this case why any one of the three leagues did not return to Pacific Lanes at the close of the first season after they moved. Absent proof that

Pacific Lanes invited these leagues back and was refused because of the eligibility rule, there is no evidence to support loss of profits from these leagues beyond the first season.

The circumstances concerning these three leagues are remarkably similar to those referred to in the *Flintkote* case concerning Flintkote's refusal to sell to plaintiffs. (246 F.2d at p. 395.) Just as with Flintkote, the refusals of these leagues to bowl at Pacific Lanes were not irrevocable. The members of each of these leagues were free to change their minds and to conclude that they would rather bowl at Pacific Lanes than be eligible to bowl in BPA tournaments. Many of plaintiff's own witnesses testified that this is precisely what they did. (Pp. 26-27 above.)

Accordingly, the inclusion of loss of profits from these three league after the first season for which they moved was speculation at best.

Second, the evidence affords no basis for any damages on account of the Tacoma Commercial League. Plaintiff's own witness testified the league moved from Pacific Lanes to Villa Lanes at the end of the 1959-60 season. (P. 38 above.) Pacific Lanes was a POBPA member at the time the league moved. There is no evidence how the eligibility rule could cause this league to move from one member house to another member house. Necessarily, it moved for reasons other than the rule. Plaintiff's claim for damages based upon the refusal of this league to bowl during the 1962-3 season is completely unsupported by the evidence and is contradicted by plaintiff's own witness.

Third, the evidence concerning the Olympic League is just as defective. The jury could have concluded that Ehly stopped bowling at Pacific Lanes because he wanted

to bowl in BPA tournaments and could not do so and bowl in the league at Pacific Lanes. (P. 39 above.) However, the reason the league disbanded was not shown to be the eligibility rule. If this had been the case, the league would not have disbanded but would have moved to a member house. Rather, the evidence is the league disbanded only because Ehly dropped out.

Fourth, plaintiff could not in fact have suffered loss of profits as a result of the moving of any of these leagues unless it proved it had sufficient available lanes to handle these leagues in the season or seasons claimed. Hoffman testified that there were "spots available" for these leagues. (P. 31 above.) However, Pacific Lanes' own records showed that there were not enough lanes available in the 1963-4 season to handle both the Men's and Women's Invitational Leagues had they been in existence and wanted to bowl there. (P. 37 above.) This was also true as to the Tacoma Commercial League in the only season claimed for it, 1962-3, and as to the Olympic League for the only season claimed for it, 1963-4. (P. 39 above.) This evidence but further illustrates the absence of evidence of the fact of damage with respect to these leagues.

There was also no evidence to support the calculation of the amount of lost profits based on the Olympic League. There was no proof of the number of teams and bowlers in this league. (P. 40 above.) Without these facts, there was nothing on which to base the conclusion that Pacific Lanes suffered lost profits of $2,164.80, as claimed.

IV.

THE EVIDENCE IS NOT LEGALLY SUFFICIENT TO SUPPORT THE VERDICT THAT THE ELIGIBILITY RULE HAD THE REQUISITE EFFECT UPON INTERSTATE COMMERCE.

Defendants moved at the close of the plaintiff's case for a directed verdict on the grounds, *inter alia,* that there was not sufficient evidence showing that interstate commerce was affected by the alleged restraints. (Tr. 1228-36.) This motion was denied. (Tr. 1236-7.) The motion was renewed at the close of the evidence and again denied. (Tr. 2540.) In this the court erred.

This Court has stated that whether or not a particular restraint occurs in or has the requisite substantial effect on interstate commerce, is generally a question of fact for the jury. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.,* 284 F.2d 1, 24 (9th Cir., 1960), reversed on other grounds, 370 U.S. 19 (1962).

It does not follow that it was proper in the case at bar for the trial court to submit the commerce issue to the jury in the face of the defendants' motion. In *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 661 (1963), this Court stated the applicable principle. It referred to

> ". . . the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.' *Baltimore & O. R. R.* v. *Groeger,* 266 U.S. 521, 524, 45 S.Ct. 169, 171, 69 L.Ed. 419 (1925). Accord, *Gunning* v. *Cooley,* 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed.

720 (1930); *Southern Pac. Co.* v. *Pool,* 160 U.S. 438, 16 S.Ct. 338, 40 L.Ed. 485 (1896)."

The evidence and all inferences the jury could justifiably draw therefrom are insufficient to support the verdict that the eligibility rule had the requisite effect on interstate commerce.

A. There Were No Significant Aspects Of Plaintiff's Business Which Can Be Said To Involve Interstate Commerce. Even If There Were, There Was No Substantial Effect On The Interstate Aspects Of Plaintiff's Business.

In *Lieberthal* v. *North Country Lanes, Inc.,* 221 F.Supp. 385 (S.D. N.Y. 1963), plaintiff sought treble damages under the Sherman Act. Plaintiff had leased his premises in Plattsburgh, New York, to defendant North Country so the latter could operate a 32-lane bowling establishment. He alleged the other defendants, which operated bowling establishments in Plattsburgh, conspired with North Country to cause the cancellation of the lease. With respect to interstate commerce, the amended complaint alleged that the Plattsburgh area drew trade from Canada and Vermont; that establishments in Plattsburgh competed with alleys in Canada and Vermont; that patronage of bowling leagues in Vermont and Canada was actively solicited; that solicitation of trade was done by radio and television advertisements; that bowling equipment to be installed in the leased premises as well as other merchandise and supplies to be sold on the premises came from out of state; and that the defendants operated interstate businesses.

The District Court granted defendants' motion to dismiss for failure to state a claim. The basis for its decision was that a bowling establishment is a local business and

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A. There Were No Significant Aspects Of Plaintiff's Business Which Can Be Said To Involve Interstate Commerce. Even If There Were, There Was No Substantial Effect On The Interstate Aspects Of Plaintiff's Business.

In *Lieberthal* v. *North Country Lanes, Inc.,* 221 F.Supp. 685 (S.D. N.Y. 1963), plaintiff sought treble damages under the Sherman Act. Plaintiff had leased his premises in Plattsburgh, New York, to defendant North Country so the latter could operate a 32-lane bowling establishment. He alleged the other defendants, which operated bowling establishments in Plattsburgh, conspired with North Country to cause the cancellation of the lease. With respect to interstate commerce, the amended complaint alleged that the Plattsburgh area drew trade from Canada and Vermont; that establishments in Plattsburgh competed with alleys in Canada and Vermont; that patronage of bowling leagues in Vermont and Canada was actively solicited; that solicitation of trade was done by radio and television advertisements; that bowling equipment to be installed in the leased premises as well as other merchandise and supplies to be sold on the premises came from out of state; and that the defendants operated interstate businesses.

The District Court granted defendants' motion to dismiss for failure to state a claim. The basis for its decision was that a bowling establishment is a local business and

that the alleged restraints therefore did not have the requisite substantial effect upon interstate commerce. The Court of Appeals affirmed on the same ground. 332 F.2d 269 (2d Cir. 1964). Because the opinions in both the District Court and the Court of Appeals so clearly spell out the local character of a bowling establishment and the reasons why the restraints allegedly applied to such an establishment do not sufficiently affect interstate commerce, substantial portions thereof are set out in Appendix C. See page 117 *infra*. As the Court noted, one essential element of a treble damage action under the Sherman Act is that the conduct complained of affects the interstate commerce of the plaintiff's business or that the conduct otherwise has a substantial effect on interstate commerce. The *Lieberthal* case is persuasive authority here. The facts alleged and found insufficient in *Lieberthal* are of considerably more substance than the facts which can be relied upon with respect to interstate commerce in the case at bar. This is particularly true with respect to the alleged interstate aspects of Pacific Lanes' business.

None of the parties in the case at bar are engaged in interstate commerce. Hoffman himself testified that 99.9% of Pacific Lanes' business came from Pierce County, and that no one from out of state bowls in its leagues. Its competitors are only the nearby houses in Tacoma.

These are only two adjuncts of plaintiff's business which can possibly be said to involve interstate commerce to any degree. One is its mailing of rental payments to AMF in New York. According to plaintiff, these payments have been down by $3,000 in each of the three seasons, a total of $9,000 in all. We submit that this circumstance is so inconsequential and insignificant that a verdict based upon it is frivolous. Whether or not the amount of rental payments mailed in interstate commerce

is greater or lesser at one period of time than during some other period of time does not involve an effect on commerce. No decision to our knowledge has concluded that the requisite substantial effect on interstate commerce is satisfied by mere changes in the amounts of checks mailed to an out of state trade creditor by a business the activities of which are local in nature.

In *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F.2d 742 (9th Cir. 1936), this Court had before it precisely the same situation. There plaintiff charged a conspiracy whereby defendants prevented plaintiff from securing billboard sites which plaintiff needed in order to sell advertising. The Court found this type of business to be local in nature, much as bowling is a local business venture in the case at bar. Significantly, this Court held (at p. 750):

> ". . . Under such circumstances, in order to come within the provisions of the anti-trust laws, the effect upon interstate commerce must be direct and not remote and must be the result of an intent to restrain interstate commerce. *Coronada Coal Co.* v. *United Mine Workers,* 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963; *Packer Corp.* v. *St. of Utah, supra.* The mere inability of the appellant's competitors to use posters because they could not secure sites for billboards is so indirect an effect upon the commerce in bill-posting material as to be beyond the regulatory power of Congress. It is not covered by the Sherman Anti-Trust Act. . . ."

So it is with the rental payments here. The effect of the eligibility rule upon them is at most but indirect and remote. *United States* v. *Oregon Medical Society,* 343 U.S. 326, 338-9 (1952).

The same conclusion is appropriate with regard to the only other conceivably interstate aspect of plaintiff's business—its purchases of bowling supplies and merchan-

disc from AMF which it in turn resells to bowlers. Significantly, plaintiff did not attempt to prove any decrease in this part of its business, or claim any loss of profits on this account. The only evidence bearing on this is Manous' testimony that Pacific Lanes is a top customer and no one does more business, together with his testimony that AMF's sales of supplies and merchandise increased in 1963 over 1962. No effect on this part of plaintiff's business was shown.

We submit, therefore, that the interstate aspects of the plantiff's business in Tacoma were so incidental to the local character of its bowling establishment as to be inconsequential. Plaintiff's business is intrastate in nature and these incidental activities do not change this characteristic. The evidence of alleged effect on these incidental activities is such that reasonable minded persons could not find for the plaintiff on this point.

B. The Eligibility Rule Did Not Affect Interstate Commerce.

The evidence shows the terms, interpretation and application of the BPAA eligibility rule from time to time, such as that the rule has been enforced by BPAA. (Tr. 156-7, 205-6, 216; pp. 19-20 above.) However, it is admitted that no eligibility rule, whether of the BPAA or of the WSBPA, was applied with respect to bowlers participating in leagues in Pacific Lanes until after the end of the season in which Pacific Lanes withdrew from the POBPA, that is, until after the end of the 1960-61 season in or about June 1961. (Tr. 1127, 1132, 1621, 1622, 1874; PX 98.) And except for the period of time from June 1960 to June 1961, the BPAA's eligibility rule applied and governed the eligibility of bowlers only in connection with the BPAA's national tournaments and qualifying

events. Only two of these were in part held in Washington (Tr. 2746) and there is no evidence that Pacific Lanes lost any bowling business because some of its bowlers wanted to bowl in either. Consequently, the only eligibility rule which could have applied to cause any of the alleged injury to plaintiff's business was the WSBPA rule.

The WSBPA rule was not shown to be other than a rule adopted by WSBPA for its own tournaments. The BPAA had nothing to do with its adoption, terms or enforcement. So far as BPAA is concerned, any affiliated association is free to have whatever eligibility rule it wants for its own tournaments. Consequently, the WSBPA rule cannot be said to affect interstate commerce because of any interstate activities of BPAA. The state rule is wholly separate and independent from the national.

There is evidence from which the jury could conclude that because of the WSBPA rule and its tournaments, some bowlers preferred to do their league bowling in WSBPA member establishments so as to be eligible. However, whether or not bowlers in Tacoma or other cities in Washington thought enough of WSBPA tournaments that they made themselves eligible for them in no way affected interstate commerce. At most, this affected only where local residents decided to pursue a part of their recreational bowling.

The evidence shows that of the Canadian bowlers who came to bowl in tournaments in Washington (the annual number varied from Mr. Grant's 3,000 down to 150 or 200) some refrained from coming in 1963 and 1964 because of the eligibility rule, or so the jury could infer on the basis of Mr. Grant's testimony. As we note below, Grant's testimony was incompetent and should not have been ad-

mitted. Nevertheless, even accepting Grant's testimony, this is not sufficient evidence of an effect on interstate commerce.

There is substantial authority to the effect that, notwithstanding an incidental effect of an alleged conspiracy may be to reduce the number of persons who come from other states and countries to do or refrain from doing the thing which is allegedly restrained, essentially local activities are not thereby converted into interstate commerce or as having an effect on commerce. See, for example, *Spears Free Clinic and Hospital* v. *Cleere,* 197 F.2d 125, 126 (10th Cir. 1952); *Riggall* v. *Washington County Medical Society,* 249 F.2d 266, 268 (8th Cir. 1957); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 170 (8th Cir. 1959); *Lieberthal* v. *North Country Lanes,* 221 F. Supp. 685, 688 (S.D. N.Y. 1963), aff'd, 332 F.2d 269, 271-2 (2d Cir. 1964). In the *Lieberthal* case, the District Court referred (221 F. Supp. at p. 686) to the conclusion that "crossing by bowling customers of state or international borders did not change an intrastate activity into an interstate one." In *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 669 (W.D. Mo. 1961) aff'd *per curiam* 301 F.2d 443 (8th Cir. 1962), the court stated:

> "Neither the facts in this case or any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have moved in interstate commerce or who have received personal service and thereafter may have moved in interstate commerce."

This Court said in *Page* v. *Work,* 290 F.2d 323, 332 (1961):

> "However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdic-

> tion to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous. . . ."

Only in its effect upon bowlers can the eligibility rule be said to have any direct effect. It has no application to anyone else. As the foregoing authorities indicate, the effect on bowlers is neither the kind nor the extent of "direct and substantial" effect upon commerce which is required for a Sherman Act violation. See also *Monument Bowl, Inc.* v. *Northern California Bowling Prop. Ass'n,* 197 F. Supp. 208, 211 (N.D. Cal. 1961), reversed on other grounds *sub. nom. Breier* v. *Northern California Bowling Prop. Ass'n,* 316 F.2d 787 (9th Cir. 1963), in which Judge Harris stated "[b]owling customers are the relevant market in the case at bar and their patronage is purely local in character."

C. The Court Erred In Admitting Grant's Testimony Regarding Canadian Bowlers.

Mr. Grant's testimony about the effect of the eligibility rule on Canadian bowlers was offered and received for the sole purpose of showing the eligibility rule had an effect on interstate commerce. (Tr. 1094, 1096, 1098.)

In particular, Grant testified that he is the Regional Manager for the Consolidated Bowling Corporation of Niagara Falls, New York, which operates 45 bowling houses, most in the United States. Three of these houses are located in British Columbia, which is Grant's region, and he manages them, and has done so for the past four years. (Tr. 1082-84.) Bowlers from Washington bowl in tournaments which he has run in his houses. (Tr. 1086.)

There are 7,242 registered league bowlers in his three houses who belong to the ABC and the WIBC (Tr. 1085, 1090.) Twenty percent of these travel across the border to Washington to bowl. "For the over-all picture, it would be roughly 3,000 bowlers." (Tr. 1086, 1107.) These bowlers come to attend mostly handicap tournaments. (Tr. 1087.) In 1962, 986 B.C. bowlers participated in the All-Coast Tournament in Vancouver, Washington. (Tr. 1087.) Over the past 5 years, he has seen thousands of Canadian bowlers bowling in tournaments in Washington. (Tr. 1108.)

Consolidated was affiliated with BPAA but withdrew in 1963. (Tr. 1091.) Since it withdrew, the majority of Grant's bowlers are not eligible to bowl in tournaments in the United States, although some are. (Tr. 1092.) Since the withdrawal in 1963, his three houses have dropped about 10% in their league bowlers. (Tr. 1092-5.) Over objections (Tr. 1092-1097) the Court permitted Grant to testify in substance that this was caused by the eligibility rule. (Tr. 1095-7.) Grant testified the traffic of his bowlers to the United States has been affected "by this," meaning apparently either the eligibility rule or the withdrawal of Consolidated from BPAA in 1963, or both. (Tr. 1097.) The traffic is "down considerable. I couldn't break it down because of the total picture because some of them do bowl in BPAA houses." (Tr. 1097.) Bowlers from his three houses have been rejected from tournaments in the United States. (Tr. 1097-8.)

On cross-examination, Grant testified the source of his information about bowlers coming to Washington was his own files and records, which are an "accumulation" of the records of a city bowlers association, presumably in Vancouver, British Columbia (Tr. 1090, 1099, 1101), as well as information obtained from league secretaries and pro-

prietors, in Washington. (Tr. 1099, 1107.) The city association records consisted of a list of Canadian bowlers by name who have bowled in tournaments in Washington. (Tr. 1100-1101.) These records are compiled by the association secretary and maintained by the city association, not by Grant, except for the time he was city secretary in 1954. (Tr. 1102, 1103.) He is not an officer of the association. (Tr. 1103, 1183-4.) The records contain duplications and no attempt has been made to eliminate the duplications. (Tr. 1103-4.)

Grant did not testify to any connection between Canadian bowlers and plaintiff's business. The traffic which he testified to, of Canadian bowlers to Washington to participate in tournaments, did not refer to BPAA tournaments or any tournment by any party in the case. The gist of his testimony is his approximation that about 3,000 Canadian bowlers do come into Washington to bowl in tournaments each year, and this is down "considerably" since 1963.

Defendants objected to various parts of Grant's testimony. They objected to his testimony about the 3,000 bowlers per year as speculation (Tr. 1089), and about what happened to the league bowling business in his three houses after Consolidated withdrew, on the ground such was a conclusion of the witness without a proper foundation, also hearsay, immaterial, and beyond the issues in the case. (Tr. 1092-1096.) These objections were overruled. (Tr. 1089, 1094, 1097.) Defendants also moved to strike Grant's testimony as being beyond the issues, and this was denied. (Tr. 1098.) After Grant's cross-examination, defendants renewed their objection to his testimony on the grounds of hearsay, irrelevant and immaterial. (Tr. 1109-10.) The Court reserved its ruling. (Tr. 1110, 2069.)

It appeared subsequently that Grant's name was not on the list of plaintiff's witnesses and that he was a substitute for a Mr. Saunders who was unable to testify because of ill-health. (Tr. 1241-2.) The Court commented that Grant kept the records himself and was very well informed, and said "it wasn't hearsay, as I understand hearsay. . . ." (Tr. 1242.)

The Court was in error. Grant's testimony about the 3,000 bowlers coming to bowl in tournaments in Washington was based upon information contained in records of the Vancouver, B. C. Bowlers Association and upon information Grant obtained from third parties. Neither the records nor the third parties were produced. The records admittedly contained duplications. Contrary to the Court's understanding, Grant started keeping those records in 1954 but since at least 1960 he had had no connection with the records or with the association. His testimony was obviously hearsay, in fact, double hearsay since it was clearly offered for the truth of what he said and since the records themselves would have been hearsay had plaintiff attempted to offer them through Grant.

The error was prejudicial. The jury was invited to consider Grant's testimony in plaintiff's closing argument, where his testimony is emphasized. Indeed, it was inaccurately emphasized, since contrary even to Grant's testimony, plaintiff's counsel argued that all of the 3,000 Canadian bowlers have stopped coming to Washington. (Tr. 2620.) In addition, the jury was invited to consider this testimony by the Court's instructions. (Tr. 2776.) Apart from Grant's testimony, there is no evidence that the WSBPA rule had any effect on interstate commerce. This Court referred to similar circumstances in finding the admission of certain exhibits prejudicial error in *Standard Oil of California* v. *Moore*, 251 F.2d 188, 216-17 (9th Cir. 1957).

V.

THERE IS NO LEGALLY SUFFICIENT EVIDENCE THAT THE OTHER ASPECTS OF THE ALLEGED CONSPIRACY AFFECTED COMMERCE.

Only the eligibility rule is relied on by plaintiff as a basis for its claim of damages. We have shown that the rule itself did not have the requisite substantial effect on commerce. However, because of plaintiff's claim that the eligibility rule was a part of a single, overall conspiracy to restrain trade, the Court permitted voluminous evidence relating to alleged price fixing and "overbuilding committee" activities of the defendants. Since plaintiff admittedly was not caused any injury because of either the alleged price-fixing or the alleged overbuilding activities, it is necessary to review this evidence only with regard to whether it supports the verdict that interstate commerce was sufficiently affected. We submit that neither the alleged price-fixing nor overbuilding aspects of the alleged conspiracy provide this essential element of plaintiff's case.

A. The Evidence Regarding Alleged Price-Fixing Does Not In Any Way Support the Verdict.

The Court had some misgivings about submitting the price-fixing claim to the jury, and said at one point that were price fixing the only issue, it would not go to the jury. (Tr. 1801-3, 1806-9.) Defendants submitted that instructions concerning price-fixing would not be applicable to the evidence. Nevertheless, the Court gave the instructions and submitted this issue to the jury. Notwithstanding, the evidence does not support the verdict that there was price fixing as alleged or that, if there was, it had the requisite effect upon interstate commerce.

1. The evidence concerning prices.

The evidence is that BPAA and WSBPA had nothing to do with the prices of bowling in Tacoma, or anywhere else. (Tr. 2361-2, 2408, 2432-3.) Prices on a national basis were never discussed at any meetings of BPAA. (Tr. 1544, 2361.) Some of plaintiff's exhibits were apparently offered to show a connection between BPAA and the price of bowling. These exhibits indicate that BPAA took nationwide surveys to report the various prices of bowling throughout the country (PX 261-G; Tr. 2333) and that BPAA published articles on the subject which in general terms emphasized the importance of profits and criticized gimmicks, price cutting, and giveaway promotions. (PX 261-G.)

The actual prices for bowling in Tacoma varied from time to time and from establishment to establishment. (Tr. 326-7, 1007, 1713, 1843-4, 1933, 2177.) Mr. Stevenson testified there was a substantial range of prices throughout the Tacoma area in the years 1960-64. (Tr. 1009.) Price fluctuations occurred in both open and league bowling (Tr. 1009), as well as a number of price differentials for bowling clubs, groups, Sunday bowling, and price "gimmicks." (Tr. 1007.) Hoffman also testified prices have fluctuated in the Tacoma area since 1960. (Tr. 1172.)

The price of bowling was discussed at POBPA meetings. (Tr. 235-8, 420-8, 960-4, 1006, 1117-20, 1702, 1716-8, 2204.) Two of plaintiff's witnesses on this point testified that there was no agreement on prices (Tr. 257, 435-6), and indeed that there was disagreement. (Tr. 232-7). Defendants corroborated this. (Tr. 1741, 2177-8, 2202-3.) Professor North testified that the economic factors which characterize the bowling proprietors' business in Tacoma indicated a very competitive situation and no price fixng. (Tr. 1932,

1935, 1938, 1967.) He added that the Tacoma area is one in which competition is substantial and which comes as close to a competitive industry as almost any found in the United States today. (Tr. 1935.) The evidence also shows without dispute that there was no agreement on prices and that prices varied in other areas in Washington. (Tr. 2344, 2360-2, 2369, 2432-3.)

We perceive the only evidence which could possibly support an inference of price fixing was the following:

The proprietor of Westport Lanes, Mrs. Rydman, testified for plaintiffs that when she was asked to join the Southwest Washington BPA, she was given a copy of SWBPA's Code of Ethics by Mr. Block, the secretary of the SWBPA. (Tr. 797, 1020.) The Code included a provision that the price for spare practice on Sunday morning must not be less than $1.00 per person. (Tr. 797, 801; PX 262.) However, the WSBPA's code does not contain such a provision (DX A-73), and the SWBPA's code is separate and apart from WSBPA. (Tr. 1022-3, 2326.) Tacoma is not in the area which the SWBPA serves. (PX 174.)

There was also some testimony by Stevenson of discussions at POBPA meetings about dividing the Tacoma houses into two categories, the newer or "A" and the older or "B" establishments, and that the older houses would charge less for bowling. Stevenson participated in this discussion. However, the smaller (and older) houses objected and did not want to be regarded as second-rate houses in such a way. It was left up to the individual proprietor. It is by no means clear that anything came of it. (Tr. 963-4, 1702, 1714-6, 1716-8.)

Hoffman's testimony indicates that if there was any price agreement, he was a party to it. Hoffman testified that sometime in March 1960, at an association meeting, he and the other proprietors discussed league schedules and prices for the 1960-61 season, and they "set up" schedules of 32, 34, and 36 weeks with prices of $1.35, $1.40, and $1.45 respectively. He testified "the only agreement was a gentlemen's agreement that we would all quote those prices." (Tr. 1117-8.) The other proprietors were not identified. Hoffman also testified that at or about this same time, in February 1960, the bidding for the GTBA city tournament was also discussed and "they were all supposed to bid in at the same price, namely $1.50 on the three man game basis." (Tr. 1120.) He did not identify who participated in the discussion or whether this occurred at a POBPA meeting.

2. The only evidence of price fixing was incompetent.

Neither Hoffman's nor Stevenson's testimony should have been accorded any weight since, by its terms, it indicated that if there was any agreement on prices, Hoffman and Stevenson themselves were parties to the agreement.

The doctrine of *in pari delicto* is applied in antitrust cases where the plaintiff is a party to the very acts which are the basis for his claim. *Pennsylvania Water & Power Co.* v. *Consolidated G.E.L. & P. Co.,* 209 F.2d 131, 133 (4th Cir. 1953), cert. den'd 347 U.S. 960; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.,* 138 F.2d 967, 971 (7th Cir. 1943), cert. den'd 321 U.S. 792; *Ford* v. *Caspers,* 42 F. Supp. 994, 998 (N.D. Ill. 1941), aff'd 128 F.2d 884 (7th Cir. 1942); *H. & A. Selmer, Inc.* v. *Musical Instrument Exchange,* 154 F. Supp. 697 (S.D. N.Y. 1957); *Lehmann*

Trading Corp. v. *J. & H. Stolow, Inc.*, 184 F. Supp. 21, 23 (S.D. N.Y. 1960). Since this is precisely the situation which the Hoffman and Stevenson testimony reveals, this Court *sua sponte* should disregard this evidence. *Ford* v. *Caspers, supra,* 42 F. Supp. at p. 998; *Brantley* v. *Skeens,* 266 F.2d 447, 452-3 (D.C. Cir. 1959). Plaintiff should not be permitted an advantage based upon acts in which it participated and now contends were illegal.

The Code of Ethics of the Southwest Washington BPA, and its provision about the price for spare practice, was admitted subject to being connected up with the defendants. (Tr. 804-5.) That association was not a party defendant. It was neither alleged to be nor shown to be a co-conspirator. The only defendant who was a member of SWBPA was Mr. Kulm. (Tr. 1019.) No other defendant was connected with the SWBPA except to the extent that local association was affiliated with the WSBPA. However, the WSBPA Code of Ethics contains no such provision and the incontroverted evidence is that the SWBPA's code is separate and apart from WSBPA and is something which SWBPA did on its own. In no way was SWPBA shown to have had anything to do with anything done by the defendant associations.

This exhibit was not admissible against any of the defendants, including Kulm, because it was not connected and had nothing to do with the alleged conspiracy. The only association to which it pertained was the SWBPA. An agreement among the members of that local association respecting the price of bowling in their houses is not relevant to and does not tend to prove the conspiracy charged against the WSBPA and the POBPA and their members. There is no evidence that the defendant proprietor associations or their members even knew the price provision in the SWBPA code existed.

3. **In any event, the evidence is not legally sufficient to support a jury finding of price fixing as alleged.**

In *Standard Oil Company of California* v. *Moore,* 251 F.2d 188, 198 (9th Cir., 1958), this Court stated:

> "The evidence is legally sufficient to support a jury finding on any question of fact, if it is of such substance and character that reasonable men might reach that conclusion. In determining whether the evidence meets this test, all reasonable inferences therefrom, favorable to the verdict, are to be drawn. Likewise, all conflicts between evidence submitted by the prevailing party and the evidence submitted by the losing parties are to be resolved in favor of the verdict. Where testimony submitted by the losing party, although not directly contradicted, is inconsistent with the verdict, it is to be assumed that the jury disbelieved such testimony, as it had the right to do.
>
> "In determining the sufficiency of the evidence to support the verdict, there is authority for appellate court disregard of the evidence held to have been improperly admitted. See *Oras* v. *United States,* 9 Cir., 67 F.2d 463, 465."

Applying this standard to the evidence of alleged price fixing in the case at bar, it is manifest that reasonable men could not reach the conclusion represented by the verdict.

The alleged conspiracy was claimed to be a nationwide conspiracy, *inter alia,* to fix the price of bowling. (See, e.g., Tr. 232-3.) There was no evidence of any such price-fixing conspiracy. The evidence that BPAA took and distributed surveys showing the prices being charged for bowling and published articles in general terms critical of price cutters is not sufficient. In addition, there must be evidence of an agreement with respect to the use of such information, and a showing that because

of the agreement the recipients are not free to do as they please with the information. This is established by two of the leading trade association cases. *Cement Manufacturers Ass'n* v. *United States,* 268 U.S. 588, 599, 603-604 (1924); *Maple Flooring Ass'n* v. *United States,* 268 U.S. 563, 582-584 (1924). There is no evidence from which the jury could properly infer any nationwide conspiracy to fix the price of bowling.

Nor are the defendants here shown in any way to be responsible for or participants in the above activities of BPAA. Participation in a conspiracy may not be inferred from mere membership in the trade association without more. *Metropolitan Bag & Paper Dist. Ass'n* v. *F.T.C.,* 240 F.2d 341, 344 (2d Cir. 1957); *Dale Hilton, Inc.* v. *Triangle Pub., Inc.,* 1961 Trade Cases ¶ 70,006 (S.D. N.Y. 1961); *The Report of the Attorney General's Committee on the Antitrust Laws,* p. 42.

Nor was there any evidence of any such conspiracy among WSBPA members in the State of Washington. At most, there is the aforesaid testimony by Hoffman and Stevenson about a local agreement or agreements among POBPA members in Tacoma, and the aforesaid provision in the SWBPA code. Even if deemed competent, the only reasonable inference to be drawn from this evidence is that there were local agreements on prices, one among POBPA members respecting Tacoma prices and one among Southwest Washington BPA members respecting prices in that area in the state. No evidence even tends to connect or relate these agreements to one another. The other evidence is overwhelmingly to the effect that there was no agreement on prices. In order to deem this sufficient proof of the nationwide conspiracy alleged, or of even a statewide conspiracy among WSBPA members, inference must be piled upon inference without any evidentiary support.

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4. There was no evidence that the alleged price fixing affected any interstate commerce.

Since there was no legally sufficient evidence of price fixing, obviously the price fixing aspect of the alleged conspiracy cannot serve as the basis for an effect upon interstate commerce. Consequently, the alleged aspect of the conspiracy upon which plaintiff relies as having injured his business, *i.e.*, the eligibilty rule, cannot on this account, be a violation of the Sherman Act.

But even if there were sufficient evidence of price fixing, it could amount only to agreements respecting purely local prices. There is no evidence that any such agreement had or could have the requisite effect on interstate commerce.

This case does not involve an agreement to fix the retail price of products moving in interstate commerce. The price here is the price at which local residents will bowl at bowling establishments in their vicinity. None of the defendant proprietors is in interstate commerce and certainly the act of bowling in their establishments is wholly unconnected with interstate commerce. Since the agreements did not occur in interstate commerce or as to goods or products in commerce, before they could constitute a *per se* violation of the Sherman Act, the evidence must show they had a substantial effect on commerce. See *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 748 (9th Cir. 1954), cert. den'd 348 U.S. 817 (1954). We perceive no basis for any conclusion that these agreements had or could have any impact on interstate commerce.

Admittedly, a local conspiracy may affect interstate commerce sufficiently to violate the antitrust laws. See, e.g., *United States* v. *Employing Plasterers' Ass'n,* 347 U.S. 186, 189 (1954); *Page* v. *Work,* 290 F.2d 323, 332 (9th Cir.

1961); *Las Vegas Merchant Plumbers Ass'n* v. *United States, supra,* 210 F.2d 732, 739. But there must be some evidentiary basis on which the jury could reasonably conclude that such an effect existed.

Certainly, if as the Court of Appeals recently stated in *Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 271 (2d Cir. 1964), affirming 221 F. Supp. 685 (S.D. N.Y. 1963), "the operation of bowling alleys, without more, is a wholly intrastate activity," then an agreement on the bowling prices to be charged within a given community cannot affect interstate commerce. As this Court stated in *Page* v. *Work,* 290 F.2d at p. 331, the Sherman Act does not extend to "purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce."

To the same effect are *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 669 (W.D. Mo. 1961), affirmed per curiam 301 F.2d 443 (8th Cir. 1962), and *United States* v. *Starlite Drive-In Inc.,* 204 F.2d 419 (7th Cir. 1953).

B. The Evidence Regarding Alleged Overbuilding Activities Does Not Support The Verdict.

The only other aspect of the alleged conspiracy is the overbuilding activities of the BPAA and the WSBPA. However, it is pertinent first to note two things about this evidence:

First, the Court instructed the jury (Tr. 2781-2):

> "There is no evidence that this plaintiff suffered any injury or financial damage resulting from actions by the overbuilding committee. Indeed, the plaintiff readily admits this. Therefore, no damages can be found by you from any actions of the overbuilding committee.

> "The reason that the evidence regarding the overbuilding committee was permitted to come before you—and it is the only reason—was to help you determine the presence or absence of a conspiracy or combination. For this purpose you may consider that evidence during your deliberations."

The Court had previously so ruled and cautioned the jury when overbuilding exhibits were discussed. (Tr. 171, 174-6.) When the above instruction was discussed later, plaintiff's attorney agreed with the substance of this, but sought a change to indicate plaintiff had not even contended it had been injured by the committee. He represented that plaintiff had not claimed that it had been injured because of the overbuilding committee, that "we haven't tried to make this an issue," and that it "would be absurd" to so contend. (Tr. 2043-8.) It is thus apparent, we submit, that the allegations and voluminous evidence about overbuilding activities were proffered by plaintiff with only one purpose in mind, that of condemning the defendants on the basis of something having nothing to do with the plaintiff's actual claim, i.e., the alleged impact of the eligibility rule on its business.

Second, the only connection between the eligibility rule and the overbuilding committees is plaintiff's allegation they were part of the same, single conspiracy. There is no evidence that supports this conclusion. The plaintiff claims damages based solely upon the eligibility rule. Admittedly the WSBPA eligibility rule is the result of concert of action among the defendants. Consequently, if the rule is an illegal restraint, we cannot deny concert of action by the defendants with respect to it. But on the question of interstate commerce, the failure of the plaintiff to prove the overbuilding activities and the eligibility rule were parts of the same conspiracy is significant. Without such evidence,

the overbuilding activities may not be relied upon to avoid the failure of the evidence to show the rule had the requisite effect on interstate commerce.

1. The evidence concerning overbuilding.

The BPAA had a committee called the Overbuilding Committee which was created after its June 1957 annual convention. (Tr. 158-160.) There is no evidence it continued in existence in or after early 1960. In 1957, there were signs of a bad situation regarding the widespread building of new establishments. BPAA members were concerned. (Tr. 161, 177.) The purpose of the committee was to provide or try to develop information on exactly what was going on in the industry in this regard. BPAA did not know just what the situation was and the committee's function was to find out. (Tr. 161, 177.) It was to do all it could do to solve the overbuilding problem "within the law of the land." (PX 271-A, pp. 28-29.)

The committee had meetings with the two manufacturers, Brunswick and AMF, respectively, and attempted to convey to them the information the committee had gathered as to what was happening in the industry and expressed its concern over the oversupply of bowling establishments. (Tr. 179-181.) It sent data about conditions in particular areas to each of the manufacturers. (Tr. 182, 194-95; PX 4, 25.) The committee's efforts with the manufacturers did not cause the latter to slow down new construction, notwithstanding the reports by the committee to the members. (E.g. PX 21.) At most, it got "lip service" in that both manufacturers said they would do what they could to help, while the tremendous rate of building continued unabated and even accelerated. (PX 261-A, pp. 28-29.) The manufacturers did not change their terms. (Tr. 182-4.)

In July 1958, the BPAA suggested that state BPA's appoint state overbuilding committees to help solve the problem. (Tr. 186; PX 6.) Some did and the state committees were asked to pass back information about situations in their areas to the national committee. (Tr. 188-89.)

Such a committee was appointed by the WSBPA in or about August 1958. (Tr. 1524-25; PX 7.) Mr. Fasso was its chairman. (Tr. 1599.) He testified that there was intense competition between Brunswick and AMF and the committee feared this would lead to the wholesale installation of lanes, demoralizing the industry. (Tr. 1650-51.) The manufacturers were overly optimistic in their profit figures. (Tr. 1525-26.) The state committee did not intend to stop the growth of bowling and was fully in accord with the right of any person to invest in any trade or business, but felt it was useful to call to the attention of the prospective proprietors some of the dangers in the industry which were not always apparent. (Tr. 1602-3; DX A-72.) The committee never tried to compel the manufacturers not to sell. (Tr. 1626.) It informed them only that the committee either did not recommend a particular proposed installation or that the committee would take no action one way or another. (Tr. 1528.) The committee would disapprove or not recommend a location if it felt it was harmful to the area. It tried to judge on the merits whether a proposed installation had a good chance of success. (Tr. 1524-25.) The committee had no power and all it could do was to bring up its viewpoint to the people involved and leave it to them to make their own decision. (Tr. 1526; PX 63; DX A-72.) The committee was disbanded long before the New Frontier Lanes was built in 1961. (Tr. 1645.)

In a report to the members of the WSBPA, approximately a year after its creation, the committee outlined its procedures. (DX A-72.) If an existing proprietor protested a proposed installation, the committee checked with the manufacturer involved to be sure the installation was actually proposed, and requested a meeting with the manufacturer together with the prospective proprietor and any other interested parties who wished to attend. A population survey was made for comparison with that compiled by the manufacturer and the committee attempted to evaluate the area from the standpoint of lineage, promotional efforts, economic character and potential, and the rate of growth in the area. It then made a recommendation in most cases. In those instances where in the committee's judgment the proposed installation was doomed to failure, the committee recommended that the project be abandoned. In other cases, it recommended that the size of the new house be reduced to a more realistic number of lanes. In other cases it recommended that the installation be deferred. In recounting the effect of its work, the committee stated ". . . we must admit that the committee has been able to exert little or no effect upon the manufacturers up to the present. . . . The results achieved by the committee have been very disappointing." Then the committee recommended that in those instances where a prospective proprietor goes ahead with an installation over the protests of the committee, his application for membership in the proprietors' associations be held in abeyance for a reasonable time to determine whether he will promote his own clientele instead of pirating leagues and preying upon the work and investments of those who pioneered the business before him. (DX A-72.)

The respective branch managers of AMF and Brunswick testified on the subject of overbuilding. Mr. Larson of Brunswick testified that in the 12-13 years he had been branch manager, he was never approached by a committee or representative of the WSBPA or any of its local affiliates with reference to not selling equipment of any kind to anyone wanting to enter the business or with a recommendation that Brunswick not sell to any such person. (Tr. 1678-79.) He attended one meeting with the state overbuilding committee but the purpose of this was to get general information from the committee in what Larson termed its advisory capacity. (Tr. 1677-78.)

Mr. Manous testified to a series of meetings he held with the state overbuilding committee. He said proprietors asked him if they could have the opportunity to talk with prospects. (Tr. 275.) It was left up to the prospective proprietor involved whether or not he wanted to meet with the committee. (Tr. 281-3.) At practically every one of the meetings the prospective proprietor was present. (Tr. 305.) These meetings were to supply him with the information and opinions of the committee about the economic feasibility of putting the particular house in question in its proposed location. No coercion was ever used and at no time did AMF ever refuse to deal with anyone on account of the meetings. (Tr. 278, 279, 283, 285, 297-9, 302-3, 306-7.)

Mr. Fasso corroborated that he never heard that Brunswick or AMF had ever refused to sell to any prospect except for credit reasons. (Tr. 1630.) There is an indication in plaintiff's exhibit 36 that the overbuilding committee thought it had been successful in discouraging new operators. But Fasso testified this was "wishful thinking" at the time. (Tr. 1638.)

There was discussion about overbuilding at meetings of the POBPA but according to plaintiff's own evidence, there was no agreement reached between the proprietors concerning this. (Tr. 257.) There is some evidence that the POBPA also had an overbuilding committee in late 1959 (Tr. 241-2, 250-1), but the witness had this confused with the state overbuilding committee. (Tr. 251.) If there was a POBPA overbuilding committee, there is no evidence that it never met with anyone or did anything.

2. There was no connection between the eligibility rule and the overbuilding activities.

In the first place, the eligibility rule does not restrain trade. As we have already developed, the rule applies solely to bowlers in the pursuit of recreational activities.

Second, the overbuilding activities were an effort to assemble all the facts and to ask the manufacturers and prospective proprietors to consider all the facts before endangering their respective investments by continuing the tremendous rate of expansion. That the proprietors' fears were justified is apparent from the dismal conditions in the bowling industry today, with the manufacturers as well as proprietors. And that the Washington committee asked the manufacturers and the prospects not to make certain installations because of the committee's views on economic conditions does not amount to an unreasonable restraint. The evidence is clear each manufacturer acted unilaterally and according to its own interests and judgment. See, *e.g.*, *United States* v. *General Motors Corp.*, 216 F. Supp. 362, 364-5 (S.D. Calif. 1963) (criminal case); *Ibid*, 234 F. Supp. 85, 88-89 (S.D. Calif. 1964) (civil case) (probable jurisdiction noted, 380 U.S. 940, March 15, 1965); *Ibid*, 1964 Trade Cases, ¶ 71,250 (S.D. Calif. 1964) (findings in civil case).

Third, even if the WSBPA overbuilding activities be regarded *arguendo* as an illegal attempt to restrain the construction of new establishments, they did not affect the plaintiff or anyone else wanting to go into the business. In every case, the manufacturer and the prospect involved went ahead notwithstanding what the committee said. Even were there evidence to the contrary, we perceive the circumstances would be identical with the conspiracy to cancel the lease which was found in the *Lieberthal* case to be insufficient as an effect on commerce.

What is more pertinent here, however, is that there is no evidence from which the jury could infer the necessary connection between the rule and overbuilding. Rather, the evidence is only that the eligibility rule and the overbuilding activities were historically unrelated, and arose in circumstances different in time as well as nature. There is nothing factually in common between the origin and implementation of the rule and the origin and nature of the overbuilding activities.

The purposes which plaintiff attributes to the two are also entirely different. According to plaintiff, the rule is a device to cause bowlers to boycott non-member proprietors and the overbuilding activities were intended to keep prospective proprietors out of the industry. Obviously, keeping prospective proprietors out of the business would in no way serve to implement the alleged purpose of the rule to boycott certain existing proprietors. We do not

understand plaintiff to contend otherwise and, in any event, there is no evidence which could support the contrary contention.

If the contention is that the existence of the rule was a means of keeping a prospect out of the business, this is equally without evidentiary support. The only evidence which can possibly bear on such a contention is that the overbuilding committee wrote some of those who decided to go ahead and build new establishments, and advised them the committee was recommending that in the event they applied for association membership, their applications be held for a reasonable time to ascertain that they were not pirating leagues from existing houses. (PX 44, 45; DX A-72.) However, these letters on their face were not efforts to stop building, but a recognition that the prospect involved was going ahead with his plans. The prospect had already decided to build and there is no evidence that any prospect decided to forego his building plans because he desired membership and the letter indicated this might be delayed. Moreover, these letters were disregarded by everyone, witness plaintiff's prompt admission into POBPA notwithstanding it received such a letter. The connection with the eligibility rule is obscure to say the least. To be sure, a non-member would not be entitled to the benefits of association membership and prospective proprietors could believe that participation in the sponsorship of BPA tournaments would be of benefit to them. It does not follow, however, that the rule thus served as a means of keeping prospects out of the bowling business, any more than would the unavailability of any other benefit of membership such as WSBPA's insurance program. There is no evidence that the benefits of mem-

bership in a proprietors' association are the *sine qua non* of that business. Almost a third of the commercial establishments in the country are not BPAA members.

The committee also wrote PX 35, a letter suggesting that a form letter be sent to all WSBPA members requesting their help for the committee. The proposed form letter was to have an attachment which the proprietors were to be asked to show to prospects, to "debunk" the supposedly huge profits to be earned in the business and to let the prospect know that if he were not accepted into membership he would lose certain services and privileges. The eligibility rule was one of those mentioned in the proposed attachment. There is no evidence that anything came of this suggestion. So far as the record shows the form letter was never sent out.

We submit that no connection was shown between the eligibility rule and overbuilding. They were not shown to be dual aspects of the same conspiracy. However interstate in nature the overbuilding activities may have been does not serve as the basis for inferring that the rule had the requisite effect on interstate commerce.

Conclusion.

For the reasons stated, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules, having in mind that application has been made for leave to exceed the page limitation.

KENNETH J. BURNS, JR.

September 13, 1965

APPENDIX A

Section 1 of the Sherman Act (15 USCA § 1) in pertinent part reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act (15 USCA § 2) reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX B

Plaintiff's Exhibits

[Note: Nos. 1-227 were marked at Tr. 73.]

No.	*Identified*	*Offered*	*Admitted*	*Refused*
1	157	159	176	
2	160	160	176	
3	159	160	176	
4	182	182	183	
5	185	186	186	
6	187	187	187, 190	
7	691	593, 693	597, 693	
8	Withdrawn		—	
9			861	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
10	691	597, 693	598, 693	
11	691	597, 693	693	
12	Withdrawn		—	
13	1606		186, 859	
14	188	189	189	
15	189	189	190	
16	691	597, 693	693	
17	Withdrawn		—	
18	Withdrawn	(191)		—
19	203	204	204	
20	190	191	192	
21	193		860	
22	192	192	193	
23	Withdrawn		—	
24	193	193	193	
25	193, 1606	194	194	
26	822, 1607	597, 822	822	
27	196	196	196	
28			859	
29	756	598	756	
30	756	598	756	
31	1650	598	2539	
32		2518	859, 2518	
33			859	
34	756	598	756	
35	822	598, 822	822	
36			859	
37			859	
38	691	599, 693	693	
39		2519		2539
40		2519		2539
41	1866	1867	1867	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
42				
43	206	206	206	
44	577, 952	577	578	
45	1645		859	
46		855	860	
47	196	196, 841		
48		599	849, 852, 2539	
49			860	
50				
51		599	852	
52			860	
53			859	
54			859	
55	239	239	240	
56	199	199	196	
57		855	859	
58				
59	391	391, 855	391, 618	
60			860	
61	Withdrawn		—	
62			859	
63	756	604	604, 756	
64			860	
65		604		
66				
67			860	
68	206	207	207, 861	
69			860	
70		606		
71			860	
72			860	
73	Withdrawn		—	
74			860	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
75	965		860	
76			860	
77				
78				
79			860	
80	208	209	209	
81	211	211	212	
82	Withdrawn		—	
83			860	
84	Withdrawn		—	
85	Withdrawn		—	
86		607	607	
87			860	
88				
89	Withdrawn		—	
90		609	611, 2519	
91	213	213	213	
92	971		860	
93				
94	1872	610	611, 2519	
95		855	860	
96		855	860	
97	Withdrawn		—	
98	1622		860	
99	Withdrawn		—	
100	"	857	860	
101	Withdrawn		—	
102				
103	Withdrawn		—	
104	"		—	
105	559	561	562	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
106				
107	746	611	746	
108	Withdrawn		—	
109	214	214	214	
110	214	214	214	
111	Withdrawn		—	
112			860	
113	Withdrawn		—	
114			860	
115	Withdrawn		—	
116		857	860	
117	Withdrawn	857	—	
118			860	
119	216	216	217	
120		2519		2521
121				
122	Withdrawn		—	
123			860	
124	Withdrawn		—	
125	216	217	217	
126			860	
127	Withdrawn		—	
128	2126		860	
129	Withdrawn	(616)	—	
130		857	860	
131			860	
132		858	860	
133		857	860	
134		857	860	
135	218	218	218	
136		857	860	
137		858	860	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
138			860	
139			860	
140				
141			860	
142	Withdrawn		—	
143			860	
144			860	
145				
146				
147	Withdrawn		—	
148	222	222	222	
149				
150				
151	Withdrawn		—	
152			860	
153	2119		860	
154	Withdrawn		—	
155	”		—	
156			860	
157				
158				
159	Withdrawn			
160	Withdrawn			
161	”			
162			860	
163				
164				
165	156	156	156	
166			860	
167			860	
168		207	860	
169			860	
170	Withdrawn		—	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
171			860	
172			860	
173				
174			860	
175	Withdrawn		—	
176			860	
177	Withdrawn		—	
178	155	155	155	
179			860	
180	Withdrawn		—	
181			860	
182	154	154	154	
183			860	
184	Withdrawn		—	
185	”		—	
186		2518	860, 2518,2539	
187	Withdrawn		—	
188	395	395, 616	403, 860	
189		2518	860, 2518, 2539	
190	Withdrawn		—	
191	”		—	
192	2417	2417	2419	
193			860	
194			860	
195	Withdrawn		—	
196	”		—	
197			860	
198				
199	Withdrawn		—	
200	”		—	
201	453		376	
202	Withdrawn		—	
203	Withdrawn			

No.	*Identified*	*Offered*	*Admitted*	*Refused*
204				
205	152	152	153	
206	Withdrawn		—	
207	Withdrawn		860	
208				
209			860	
210	Withdrawn		—	
211	”		—	
212	151	151	152	
213				
214	404	404	404, 860	
215				
216	Withdrawn		—	
217				
218				
219	Withdrawn		—	
220				
221				
222				
223				
224			860	
225	1664		367	
226	Withdrawn			
227		621	151, 621	
228	223	223	223	
229	453	2522	2522	
230	”	622	655	
231	”	622	655	
232	185, 453	839		841
233	453, 988			
234	453, 988			
235	453			

No.	*Identified*	*Offered*	*Admitted*	*Refused*
236	”			
237	”			
238	453			
239	78	79	79	
240	87	87	87	
241	87	87	87	
242	453		861	
243	”		861	
244	”		861	
245	”		861	
246	”		861	
247	”		861	
248	”		860	
249	”		861	
250	340	340	341	
251	340	340	341	
252	340	340	341	
253	338	338	339	
254	338	338	339	
255	338	338	339	
256	338	338	339	
257	338	338	339	
258	1052			
259	1052, 1211	1212	1213	
260				
261A	389			
261B	”			
261C	”	622	623, 2519	
261D	”			
261E	”	2522	2523	
261F	”			
261G	”	390, 622	391	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
261H	”			
261I	”			
261J	”			
261K	”			
261L	389			
261M	”			
261N	”	2523	Reserved & Withdrawn	
261O	”			
261P	”			
261Q	”			
261R	”	2524	2525	
262	721	796-7	798	
263	920			
264	2240	2246	2246	
265	2480	2497	2497	

Defendants' Exhibits

[Note: Nos. A-1 through A-70 were identified by list of exhibits.]

A-1			
A-2			
A-3			
A-4			
A-5			
A-6			
A-7			
A-8	1267	1301	1322
A-9	1268	1326	1331
A-10	1268	”	”
A-11	1268	”	”
A-12	1268	”	”
A-13	1268	”	”
A-14	1268	”	”

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-15				
A-16				
A-17				
A-18				
A-19				
A-20	1591	1592	1593	
A-21	1270, 1358	1359	1359	
A-22	1271, 1357	1359	1359	
A-23	1271, 1360	1361	1362	
A-24	1272, 1346	1348	1348	
A-25	1272, 1346	”	”	
A-26	1272, 1346	”	”	
A-27	1272, 1346	”	”	
A-28	1272, 1348	1349	1350	
A-29	1273, ”	”	”	
A-30	1273, ”	”	”	
A-31	1273, ”	”	”	
A-32	1273, ”	”	”	
A-33	1273, ”	”	”	
A-34	1273, ”	”	”	
A-35	1273, 1348	1349	1350	
A-36	1274, 1348	”	”	
A-37	1274, 1350	1350	”	
A-38	1274, ”	”	”	
A-39	1275, ”	”	”	
A-40	” ”	”	”	
A-41	” ”	”	”	
A-42	” ”	”	”	
A-43	” ”	”	”	
A-44	” ”	”	”	
A-45	” ”	”	”	
A-46	1276, ”	”	”	
A-47	1276, ”	”	”	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-48	1276, 1344	1345	1346	
A-49	"	1333	1335	
A-50	"	"	"	
A-51	"	"	"	
A-52	"	"	"	
A-53	"	"	"	
A-54	"	"	"	
A-55	1277	1341	1343	
A-56	"	"	"	
A-57	"	"	"	
A-58	"	"	"	
A-59	"	"	"	
A-60	"	"	"	
A-61	"			
A-62	"			
A-63	1297, 1343	1344	1344	
A-64				
A-65				
A-66	1407	1407	1408	
A-67	1351	1353	1353	
A-68	1532	1533	1534	
A-69				
A-70				
A-71	1402	1403	1406	
A-72	1590, 1600	1601	1601	
A-73	1590, 2401	2401	2401	
A-74A	1888	1891	1891	
A-74B	1888	"	1891	
A-74C	1888	"	1891	
A-74D	1888	"	1891	
A-74E	1888	"	1891	
A-74F	1888 "	"	1891	

No.	*Identified*	*Offered*	*Admitted*	*Refused*
A-74G	1888	"	1891	
A-74H	1888	"	1891	
A-75	1991	1992	1992	
A-76	2214	2214	2214	
A-77	2230	2230	2230, 2234	
A-78	2233	2233	2234	
A-79	2256	2257	2257	
A-80	2413	2413	2413	
A-81	2413	"	2413	
A-82	2413	"	2413	
A-83	2413	"	2413	
A-84	2413	"	2413	

APPENDIX C

In *Lieberthal* v. *North Country Lanes, Inc.*, 221 F.Supp. 685, 688 (E.D. N.Y. 1963), after referring to decisions involving exhibitions such as boxing matches and theatrical productions, the District Court stated as follows:

> "These situations are entirely unlike the operation of bowling alleys, where the business supplies only the premises and equipment and the customer entertains himself; he is not entertained by the exhibition of persons or apparatus gathered in interstate commerce. The flow to the bowling alley of equipment and appurtenances is not averred in the amended complaint to be continuous and it could not be; it is virtually a 'one-shot' affair, the equipment being durable and long lasting. There is no averment that radio, movie or television rights are sold in respect of the activities conducted at the Plattsburgh alleys and obviously they are not. That radio and television are used to solicit customers for the local activity seems irrelevant; the radio and television stations may be engaged in interstate commerce but not, merely by use of these media, is the advertiser.

"Plaintiff cites *United States* v. *Employing Plasterers' Ass'n of Chicago,* 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954) and *United States* v. *Women's Sportswear Mfgrs. Ass'n,* 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949). These cases are not in point because they relate to the interstate sale of goods. Where the process of production, transportation and sale of goods in interstate commerce is a continuous one, a local restraint either at the beginning of the process (as in *Mandeville Farms,* above) or at the end of the process (as in *Employing Plasterers,* above) may nevertheless directly affect interstate commerce.

"Certainly such is not the situation here. On the contrary the bowling alley business is more like the operation of barber shops (*Hotel Phillips, Inc.* v. *Journeymen Barbers, Hairdressers, Cosmetologists, and Proprietors Intern. Union of Amer.,* 195 F.Supp. 664, W.D. Mo. 1961, affirmed per curiam 301 F.2d 443, 8th Cir., 1962), or hospitals (*Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 8th Cir., 1959), or publishing legal notices (*Page* v. *Work,* 290 F.2d 323, 9th Cir., 1961). In these cases, incidental flow of supplies in interstate commerce to the local enterprise, or travel in interstate commerce of customers of the local enterprise, or soliciting business in other states for the local enterprise, did not make the local enterprise a part of interstate commerce under the Sherman Anti-Trust Act. See also *Coulter Funeral Home, Inc.* v. *Cherokee Life Ins. Co.,* 32 F.R.D. 358 (E.D. Tenn. 1963) dealing with the question whether operation of funeral homes is interstate commerce under the Act."

In its opinion affirming the District Court in the *Lieberthal* case, the Court of Appeals stated as follows (332 F.2d 269, 271-272 (2d Cir. 1964)):

"The operation of bowling alleys, without more, must be held to be a wholly intrastate activity.

"A business of which the ultimate object is the operation of intrastate activities, such as local sporting or theatrical exhibits, may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character. *United States* v. *International Boxing Club,* 348 U.S. 236, 241, 75 S.Ct. 259, 99 L.Ed. 290 (1955) (25% of income derived from interstate operations); *United States* v. *Shubert,* 348 U.S. 222, 225, 75 S.Ct. 277, 99 L.Ed. 279 (1955) (continuous interstate transportation of personnel, property, communications, and payments); cf. *Aeolian* v. *Fischer,* 40 F.2d 189 (2d Cir. 1930) (organ installation an integral part of interstate contract of sale). It has frequently been held, however, that the incidental flow of supplies in interstate commerce, *Page* v. *Work,* 290 F.2d 323, 332 (9th Cir.), cert. denied, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961) (publishing legal notices); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F. 2d 167, 170 (8th Cir.), cert. denied, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959) (hospitals); *Lawson* v. *Woodmere, Inc.,* 217 F.2d 148, 149 (4th Cir. 1954) (cemetery vaults), the interstate travel of customers of the local enterprises, *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 230-32, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947) (taxicab service to and from railroad stations); *Elizabeth Hospital, Inc.* v. *Richardson, supra* at 170-71 of 269 F.2d, the solicitation of business in other states for the local enterprise, *Page* v. *Work, supra* at 329 of 290 F.2d, the utilization of interstate communications media, *Martin* v. *National League Baseball Club,* 174 F.2d 917 (2d Cir. 1949) (interstate broadcast of baseball games), or a location in an area of interstate activity, *Hotel Phillips, Inc.* v. *Journeymen Barbers, etc., Union,* 195 F.Supp. 664, 666 (W.D. Mo. 1961), aff'd per curiam, 301 F.2d 443 (8th Cir. 1962) (barbershops in Greater Kansas City Metropolitan Area), do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.

"'The controlling consideration * * * [is] a very practical one—the degree of interstate activity in the particular business under review.' *United States* v. *International Boxing Club, supra* at 243 of 348 U.S., at 262 of 75 S.Ct. Lieberthal's complaint alleges that the influx of equipment necessary to outfit the bowling alleys would be substantial. But the initial outfitting would have been a 'one-shot' affair, as the District Judge observed, and could not be held to convert the bowling lanes into an interstate enterprise. The allegations in the complaint do not indicate that the interstate movement of customers and supplies to North Country Lanes or the interstate advertising by North Country Lanes involved or would have involved a significant degree of interstate activity. Under the above cited authorities, such allegations are insufficient to state a claim for relief under the Sherman Act. See *Martin* v. *National League Baseball Club, supra* at 918 of 174 F.2d ('the bare allegation in a complaint that the defendants made contracts with broadcasting and television companies will not support the jurisdiction of the court').

"It may be that defendants, as owners of national bowling alley chains, are interstate businesses. But 'the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.' *Page* v. *Work, supra* at 330 of 290 F.2d. Accord, *United States* v. *Yellow Cab Co., supra* (carriage by defendant of passengers from one train station to another is in interstate commerce but other taxi transportation to and from stations is intrastate commerce). Lieberthal does not allege any restraint of the national activities in which defendants are engaged; he complains only of an agreement affecting their intrastate operations.

"We hold that the complaint does not establish a Sherman Anti-Trust Act violation based on acts occurring in interstate commerce.

"We next consider whether the complaint can be sustained as stating a claim for relief based on local acts having a substantial effect on interstate commerce.

"As Lieberthal points out, the Sherman Act condemns wholly local business restraints that affect interstate commerce as well as restraints in interstate commerce. See *United States* v. *Employing Plasterers' Ass'n,* 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954); *United States* v. *New Wrinkle, Inc.,* 342 U.S. 371, 377, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Women's Sportswear Mfg. Ass'n,* 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949). But the effect of the local restraints on interstate commerce must be 'direct and substantial, and not merely inconsequential, remote or fortuitous.' *Page* v. *Work, supra* at 332 of 290 F.2d. See also *United Leather Workers Int'l Union* v. *Herkert & Meisel Trunk Co.,* 265 U.S. 457, 471, 44 S.Ct. 623, 68 L.Ed. 1104 (1924); *Las Vegas Merchant Plumbers Ass'n* v. *United States,* 210 F.2d 732, 739-40 n. 3 (9th Cir. 1954)."